TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 38

JULIUS SALSBURG, APPELLANT,

vs.

STATE OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED APRIL 11, 1953

Probable jurisdiction noted May 18, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 38

JULIUS SALSBURG, APPELLANT,

vs.

STATE OF MARYLAND

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 11, 1953.

—8578

[fol. a] In the Court of Appeals of Maryland, October Term, 1952

No. 49

Joseph John Rizzo, Wm. Raynard Nicholson, Julius Salsburg, Appellants,

vs.

State of Maryland, Appellee.

Three Appeals from Circuit Court for Anne Arundel County (Michaelson, J.)

Appendix for Appellants—Filed September 5, 1952

APPENDIX TO APPELLANT'S BRIEF NO. 49

DOCKET ENTRIES

May 29, 1952—Warrant from L. J. De Alba J. P. and Prayer for Jury Prayed by State.

June 13, 1952—Order to enter appearance of Louis M. Strauss and Joseph Leiter.

June 13, 1952—Motion to dismiss warrant and return of property to the defendant fd.

June 13, 1952—Motion overruled.

June 13, 1952—Plea of Not Guilty — Court Trial.

June 13, 1952—Motion for directed verdict fd. — Overruled.

June 13, 1952—Guilty — 6 months, $1,000.00 fine and costs.

June 13, 1952—Order for appeal filed.

June 13, 1952—Application and recognizance filed in sum $2500.00.

June 16, 1952—Designation of record.

June 23, 1952—Testimony filed.

July 28, 1952—Petition to extend time for filing and transmission of record filed and Court of Appeals order dated July 15, 1952.

The Docket Entries in Nicholson and Salsburg cases are identical.

STATE WARRANT

State of Maryland, Anne Arundel County, to-wit:

To Daniel Bratton Chief of Police, of said County, Greeting:

WHEREAS, Complaint has been made before me, the subscriber, one of the Justices of the Peace of the State of Maryland, in and for the said County, upon information and oath of Capt. Wilbur Wade who charges that Julius Salsburg did on or about the 21st day of May, 1952 at 5619 Ritchie Highway, Brooklyn, A. A. Co., Md. did violate Sect. 291 of Art. 27, Annotated Code of Md. in that the Defendant did make or sell a book or pool on the result of a running race of horses.

You are therefore commanded immediately to apprehend the said Julius Salsburg, 3709 Key Ave., Balto., Md. and bring him before me, the subscriber, or some other Justice of the said State, in and for said County, as aforesaid, to be dealt with according to law. Hereof fail not, and have you then and there this warrant.

Given under my hand and seal this 22nd day of May in the year of our Lord, 1952.

LOUIS J. De ALBA, J. P. (Seal)

The Warrants in Rizzo and Nicholson are identical.

MOTION TO DISMISS PROCEEDINGS AND QUASH WARRANT AND RETURN PROPERTY TO THE DEFENDANTS.

To the Honorable, the Judges of said Court:

The traverser, by Joseph Leiter and Louis M. Strauss, his attorneys, moves to quash a warrant issued in this cause to Captain Wilbur Wade, under which person the premises of the traverser was broken into and searched

and certain items to be offered in evidence against the defendant in the trial of this cause were procured, and in support of this motion and petition sets forth the following reasons:

1. That this Court does not have jurisdiction to try this case on the warrant filed in these proceedings.

2. That the charge against the Traverser is neither by indictment or information as required by the law and rules promulgated by the Court of Appeals of Maryland, effective January 1, 1950.

3. That there has been no verdict or trial on the warrant issued by the Trial Magistrate and, therefore, these proceedings are not in the nature of an appeal from the Trial Magistrate.

4. That the warrant issued in these proceedings was issued by the Trial Magistrate on the oath and information of Captain Wilbur Wade, which said information was obtained from evidence illegally obtained from your Petitioner as a result of an illegal and improper search and seizure, guaranteed the Defendant under the Maryland State and United States Constitutions, as well as the existing State Laws relative to search and seizure and search warrants relating thereto.

5. The information and oaths sworn to by Captain Wilbur Wade was obtained and is formulated on the basis of property taken from your traverser which is not admissible in evidence against your traverser at the trial of this cause.

6. That the property taken from your Petitioner as aforesaid, and by the Officers accompanying him, is not admissible in evidence against your Defendant, at the trial of this cause.

7. And for other reasons to be assigned at the hearing of this motion.

Wherefore, Your Petitioner Prays:

1. That the warrant issued to Police Officer Captain Wilbur Wade be quashed.

2. That these proceedings on said warrant be dismissed.

3. That the articles, items and property enumerated in the Return of the Police as taken from the premises of your Defendant, and all other property of the Defendant in custody of the State taken from this Defendant by virtue of the aforesaid illegal entry and search of your Petitioner and his premises, and by virtue of the aforesaid warrant for his arrest be returned to your Petitioner.

JOSEPH LEITER,

LOUIS M. STRAUSS,

Attorneys for Traverser.

Identical Motions were separately filed on behalf of Nicholson and Salsburg.

(St. Tr. 1-9):

TESTIMONY ON MOTION TO SUPPRESS

(Mr. Strauss) We can stipulate that there is no search warrant in this case.

(The Court) Let the record so show that the State and Counsel for the defendants agree that no search warrant was issued for invasion of the premises.

(Mr. Strauss) We will take the testimony on whether or not there was a crime committed in their presence. Call Captain Wade.

(Mr. Morton) Could the State be enlightened as to exactly what the purpose of this examination is.

(The Court) To determine whether or not the time the premises were invaded or entered, the officers saw any-

thing which would indicate that there was a commission of a misdemeanor.

(Mr. Morton) May I make further inquiry as to whether the interrogation is going to be confined to what the officers saw prior to entrance into the premises or what they saw subsequent to the entrance.

(The Court) Prior to the entrance as the Court understands it. In other words, it comes within the category of whether or not they had probable cause to enter the premises, based on the search warrant as issued, whether they observed anything that would indicate to a man experienced as an officer of the law, the nature of the violation of the gambling law going on. It is so closely related to no search warrant, there seems to be a fine distinction. If they had a right, assuming that the House Act had been amended and that amendment is validated, they wouldn't have to worry about a misdemeanor or the commission of any kind, they would have a right to go into the premises on the assumption the amendment of the House Act gave them that right. The position of the defendants as the Court sees it in support of his motion, he wants to support the stipulation by having the record show that irrespective of whether or not a search warrant was issued, the conditions were such that the officers were not justified in entering the premises because there was nothing happening on the outside to indicate to them that there was anything wrong or unusual going on.

(Mr. Strauss) We also stipulate that the traversers involved were in possession of the premises at the time.

(Mr. Morton) No, the State won't concede that.

CAPT. WILBUR C. WADE, a witness of lawful age, being first duly sworn, deposes and says:

By Mr. Strauss:

1. Give your name. A. Capt. Wilbur C. Wade.

2. Captain Wade, you are a member of the Anne Arundel County Police Force? A. Yes.

3. You are Capt. Wilbur C. Wade, who swore to the warrant of John Joseph Rizzo? A. Yes I am.

4. And William Raymond Nicholson and Julius Salsburg; you are the officer who swore the warrant? A. Yes, sir.

(Mr. Strauss) May it please the Court, we submit these three warrants in support of the motion in 1684 Criminals, 1685 Criminals and 1686 Criminals.

5. On May 21, 1952, did you have occasion to arrest three men involved in these proceedings? A. Yes I did.

6. Will you state for the record where you arrested them? A. In a small building in the rear of Roland Terrace Garage and the intersection to Third Street and Governor Ritchie Highway.

7. Who accompanied you when you made the arrest? A. Colonel Bratton, Lt. Baum, Officer George Welham and Officer Charles Gleim.

8. What time of the day did you get there? A. Approximately one p. m.

9. When you got there, describe the building in which you arrested them? A. It is a two-room building and Mr. Travers lives in the front room and the rear room is 20 by 16; I have a photograph of the building.

10. Will you describe the number of doors in the building and the number of windows in it? A. There were two doors, one to the front room, one to the rear room; the door to the rear room was on the west side of the building.

11. When you arrived there, was any doors open in the building, any windows? A. The front door was open in the front room and the room to the rear was not open.

12. The front door that was open led into the premises occupied by whom? A. Mr. Travers the night watchman for Mr. Utz.

13. How did you get into the second part of this building? A. We attempted to get someone to come to the door and open it; no one answered; we finally took an axe and pried the door open.

14. Did you see inside the second room from the outside? A. No, we couldn't; the window was painted; there was only one small window.

15. When you got there to make this arrest, did you see any of these three men? A. No sir, I did not.

16. Did you take certain articles from this place when you arrested these men?

(The Court) I understand what went on inside of the premises is not the subject matter of this proceeding so far.

17. When you got to the premises, did you hear anything? A. We tried to but we couldn't hear any noise at the time.

18. How did you get the door open? A. We forced it open with an axe.

By Mr. Morton:

1. Captain, did you observe any wires leading into the premises? A. Yes sir, we found three telephone wires, call boxes on the north side of the Roland Terrace Garage; we traced these wires to a small little pipe —

(Mr. Strauss) Object.

(The Court) Was that done before you entered or after? A. Before.

(Mr. Strauss) How long before? A. Approximately ten minutes. These wires ran into a pipe under the ground over to the small building.

2. Did you have any information in your possession as to the number of phones in that building? A. Yes, we did.

3. Did you have information that there was bookmaking being conducted in the building?

(Mr. Strauss) Objected to.

(The Court) Sustain the objection. What was the size of this room that you finally entered? A. 10 by 16.

CROSS EXAMINATION

By Mr. Strauss:

1. Captain, based on these telephone wires, leading to this building, on the basis of this information, you broke into this room, is that right? A. Upon the advice of the State's Attorney.

(The Court) The Court will overrule the motion on the theory that the amendment to the Bouse Act is constitutional at this point and that being so, the Court is not concerned with how the evidence is presented.

(Mr. Strauss) We want to put another witness on for the purpose of the record, the man testifying only on this motion.

(The Court) Yes this is all before the pleadings in the case in support of the contentions set forth in the motion.

JULIUS SALSBURG, a witness of lawful age, after being first duly sworn, deposes and says:

By Mr. Strauss:

1. Your name is Julius Salsburg? A. Yes sir.

2. Are you familiar with the premises that were raided the 21st of May, 1952 and were you arrested as testified to by Capt. Wade? A. Yes sir.

3. Did you lease these premises? A. I rented it, yes sir.

4. Who did you pay rent to? A. John Utz.

5. How many months did you pay rent there? A. Two months.

(The Court) Do you have anything to show, any receipts? A. No I haven't.

6. How much did you pay? A. Fifty dollars a month.

7. Did you pay the telephone bill of these premises? A. A. Yes I did.

8. Whom did you pay it to? A. Telephone Company.

9. Where? A. On Light Street.

10. Were you in these premises when the door was broken down and you were arrested? A. Yes sir, I was.

11. Did anybody read you a search warrant? A. No they did not.

CROSS EXAMINATION

By Mr. Morton:

1. How long have you been renting these premises? A. Approximately two months.

2. Do you remember the beginning date? A. No I do not, sir.

3. How did you pay the rent? A. To Mr. Utz.

4. In cash? A. In cash.

5. When did you pay it? A. I think it was on or about the first of the month.

6. Whose name was the telephone in? A. I understood it was in the Ritchie Highway.

7. Was it, or wasn't it? A. The Ritchie Transfer Company.

8. Are you an employee of the Ritchie Transfer Company? A. No I am not.

(The Court) What does the Ritchie Transfer Company do? A. I wouldn't know, Your Honor.

(The Court) Who had the phone put in their name? A. That I couldn't even say.

(The Court) You didn't? A. No sir.

9. Whose permission did you have to pay this telephone bill? A. The party who brought me to Mr. Utz.

10. Who is the party who brought you to Mr. Utz. A. Mr. Bass.

11. What's his full name? A. Mr. Harry Bass.

12. Did he give you the money to pay to Mr. Utz? A. No, he did not.

13. Are you sure of that? A. Positive.

(The Court) The Court just wants to caution you not to intimidate you. You are under oath. I say this for your own benefit. I want you to tell the truth. If it develops that you have committed perjury, you will be indicted for perjury and prosecuted accordingly. This is a serious matter. The Court understands human nature and the nature of these rackets and everything that goes with it. You are sworn to tell the truth, the Court advises you to tell the truth. If something develops that shows that you have made false statements which means that you have perjured yourself you will have a serious charge in front of you, possibly more serious than your present predicament. Go ahead and reply to the questions as you know them.

14. What days of the week would you occupy these premises? A. Six days a week.

15. Excluding Sunday? A. Yes sir.

16. What time did you arrive? A. No set time.

17. What time would you leave? A. No set time.

18. What did you use the premises for? A. Well, you should know that.

(Mr. Strauss) Answer the question? A. Booking horses.

19. Is that your regular business? A. That's what I was doing at the time.

20. How long had you been doing it?

(Mr. Strauss) We object to that.

(The Court) Let it go at that.

21. Did you have a written lease for these premises? A. No I did not.

22. Did you have an arrangement as to the length of time your lease was to run? A. No I didn't.

(The Court) Explain to the Court just how you arranged to lease these premises. To whom did you talk, when did you talk about what terms were arranged. Give me a picture of what you did when you wanted to go on the premises. You did go on there by virtue of this lease? A. Well, Your Honor, I heard of a place that had three phones and knew a party that had owned the phones, at least I thought he did; I won't go on record as saying he owned them; I don't know, and I asked him to do me a favor, would he rent them to me, would he give them to me, or however he felt and he said, "Well I don't know; let's go up and speak to Mr. Utz" and we did, and that's how it came about.

(The Court) What did you say to Mr. Utz? A. I asked him what he wanted for the rent of this particular premises and he mentioned a certain stipulated sum of money, $50.00, and I asked him would it be satisfactory if I would rent it, and he said that it would and I did.

(The Court) Did he ask you what you were going to do on the premises? A. No he did not, at least, I can't recall it.

(The Court) There were three phones in there at the time? A. Yes sir.

(The Court) In whose name were they listed? A. At the time I got the first bill, it was the Ritchie Transfer Company.

(The Court) Then you went into possession of the premises? A. Yes sir.

(The Court) You have no receipts or anything to show you rented it? A. Your Honor, I didn't ask for any.

(The Court) Why not? A. Well to be honest with you, I didn't think it was necessary.

(The Court) You didn't want any record to show, did you? A. Well, no, I wasn't thinking that particular thing at the time.

(The Court) You don't know who the Ritchie Transfer Company is? A. No sir I do not.

(The Court) You don't know what business they were engaged in? A. All I know is that these particular phones were available.

(The Court) Did anybody who represented himself as an officer or employee of the Ritchie Transfer Company tell you that you could go into possession of the premises? A. No sir, I don't believe so.

(The Court) Was this a Corporation? A. I really don't know, sir.

(The Court) Where did you get the name from, Ritchie Transfer Company? A. That was already there; I had nothing to do with it, Your Honor.

CAPT. WILBUR C. WADE, having already been sworn, deposes and says:

By Mr. Strauss:

1. You do have a warrant out for a person named Bass and you haven't apprehended him yet? A. Yes sir, we do.

(The Court) All three motions in each case are overruled.

(Mr. Strauss) Now we will agree to try all three cases together and the plea is not guilty.

(The Court) Let the record show by agreement of counsel and the State Nos. 1684, 1685 and 1686 Criminal are consolidated and tried together, defendants plead not guilty in each case, election of trial before the Court.

[fol. 16] IN THE COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1952

No. 49

JOSEPH JOHN RIZZO, WM. RAYNARD NICHOLSON, JULIUS SALSBURG

v.

STATE OF MARYLAND

OPINION—Filed December 12, 1952

Chief Judge Markell delivered the Opinion of the Court:

These are appeals from judgments and sentences on conviction of bookmaking. Defendants were arrested on warrants charging bookmaking. Before the magistrate the State's Attorney prayed jury trial. In the circuit court the case was tried without a jury. Code of 1951, Art. 52, sec. 14. *Wilson* v. *State*, —— Md. ——, 88 A. 2d 564.

Before issuance of the warrants for arrest, and without a search warrant or any warrant at all, members of the Anne Arundel County police force, "upon the advice of the State's Attorney", entered by the use of an axe the rear room of a small two-room building in the rear of Roland Terrace Garage, at the intersection of Third Street and Governor Ritchie Highway. There the officers arrested defendants and seized "incriminating evidence" [appellants' brief], the nature of which is not specified in either brief or appendix. There were three telephones there, and three telephone wires leading in. Motions of each defendant that "the articles, items and property enumerated in the return of the police as taken from the premises of your defendant, and all other property of the defendant in custody of the State taken from this defendant * * * be returned to your petitioner" were overruled. Presumably [fol. 17] (it does not affirmatively appear) the articles seized were admitted in evidence.

As amended by Chapters 704 and 710 of the Acts of 1951 [approved May 7, 1951, exective June 1, 1951], the Bouse Act (Code of 1951, Art. 35, sec. 5) contains a proviso, "Provided, further, that nothing in this Section shall prohibit

the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title." As to Anne Arundel County this proviso was added by Chapter 704, as to Wicomico and Prince George's by Chapter 710. Defendants contend that Chapter 704 denies them the equal protection of the laws and is unconstitutional. The State contends that the act is constitutional, and also that defendants had no title or interest in or to the premises searched and therefore no right to complain of the search and seizure as illegal.

There is no evidence—and no allegation other than any implication in mention of "the premises of your defendant" in the unsworn petitions for return of property seized—that defendants Rizzo and Nicholson had any interest in the premises. Defendants say it is sufficient that they claim the property seized. They cite *United States* v. *Jeffers*, 342 U. S. 48, and the often repeated statement of this court that "one cannot complain of an illegal search and seizure of premises *or* property which he neither owns, nor leases, nor controls, nor lawfully occupies, nor rightfully possesses, or in which he has no interest." [Italics supplied]. *Baum* v. *State*, 163 Md. 153, 157. Although this statement in the *Baum* case was believed to be supported by many cited state and federal cases, including one Supreme Court case, it appears that recent Supreme Court cases recognize a broader right to complain. *United States* v. *Jeffers*, 342 U. S. 48, citing *McDonald* v. *United States*, 335 U. S. 451, [fol. 18] 456. In the *Jeffers* case narcotics seized without a search warrant in a hotel room of defendant's aunts, in the absence of defendant and his aunts, were ordered suppressed as evidence, though not returned to defendant because they by law were contraband. The decision was not based on the ground that the seizure was illegal, though the search was not (as to the defendant), but on the ground that "the search and seizure" were "incapable of being untied", and therefore were an invasion of the defendant's rights, though he had no interest in the premises. We need not further pursue the *ratio decidendi* in the *Jeffers* case.

If it supports defendants' contention in the instant case, it is contrary to the often repeated statement of this court in the *Bouse* case.

We are not infrequently reminded by counsel of our statement in *Wood* v. *State*, 185 Md. 280, 285, that "The Bouse Act and the Act of 1939 amount to adoption *pro tanto* of the Supreme Court decisions under the Fourth Amendment." The context shows that the extent of *pro tanto* was the meaning of "illegal search and seizure" as dependent upon want of "probable cause".

In the instant case defendants were convicted on a charge of "making or selling a book or pool on the result of a running race of horses". "Incriminating evidence" to support that charge necessarily showed that defendants were "using and occupying" the building for bookmaking, an offense committed in the officers' presence. Since, therefore, defendants Rizzo and Nicholson could not complain that the search of the premises, in which they had no interest, was illegal, the arrest of them without a warrant and seizure of this evidence was not unlawful as to them.

Defendant Salsburg testified that he rented the premises by an oral lease, at $50 a month, for no definite term, from a named owner, and that he paid the rent to the owner in cash. This testimony was uncorroborated but uncontradicted. It was received by the judge with evident suspicion, but the judge did not say that he did not believe it or that he overruled Salsburg's motion to return on that [fol. 19] ground. We cannot hold that the judge (who saw the witness) could not believe Salsburg's testimony and should have overruled his motion on that ground. The fair implication, in the absence of anything to the contrary, is that the motions were overruled because the act was held constitutional and not because Salsburg had no right to raise the question. *Cf. Lambert* v. *State*, —— Md. ——, 75 A. 2d 327, 328.

In *Sugarman* v. *State*, 173 Md. 52, 57-58, we held that a motion, before trial, to declare a search warrant null and void and to suppress use of the articles seized as evidence and compel return of them was "founded upon no statute of this State", nor "supported by precedent to justify its propriety." In *Smith* v. *State*, 191 Md. 329, 334, and in

Lowe v. State, 198 Md. 66, 73, 66 A. 2d 661, 663, we noted that such a motion to quash a search warrant is now authorized by statute. Code of 1951, Art. 27, sec. 593. In the instant cases the motions made are not authorized by statute, but are closely analogous to motions to quash. Rule 3 (1) of the Criminal Rules of Practice and Procedure provides that, "Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion." Rule 3 (4) provides that, "A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue." In the instant cases the court did dispose before trial of the questions thus raised. This rule includes the motions in the instant cases.

The question of the constitutionality of Chapter 704 is therefore presented for decision in Salsburg's case. We have decided to order a reargument on this constitutional question alone in Salsburg's case. For the reasons already stated, the judgment will be affirmed as to Risso and Nicholson.

Judgment affirmed with costs as to Risso and Nicholson. Reargument of Constitutional Question only ordered as to Salsburg.

Filed: December 12, 1952.

[Vol. 20] In the Court of Appeals of Maryland, October Term, 1952

No 49

Julius Salsburg

vs.

State of Maryland

Opinion—Filed February 5, 1953

Delaplaine, J., delivered the Opinion of the Court.

Julius Salsburg, who was convicted by the Circuit Court for Anne Arundel County of bookmaking on horse races,

is challenging here the constitutionality of Chapter 704 of the Laws of 1951, which amends the statutory rule of evidence known as the Bouse Act, Laws 1939, ch. 194, by adding a proviso that the Act shall not prohibit the admission of illegally procured evidence in Anne Arundel County in prosecutions for violations of the State gambling laws.

The Act was also amended by Chapter 710 of the Laws of 1951, which provides that the Act shall not prohibit the admission of such evidence in Wicomico and Prince George's Counties. Thus the Act, as codified in Code 1951, art. 35, sec. 5, provides as follows:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State * * *. Provided, further, that nothing in this section shall prohibit the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title."

Salsburg and two other men, Joseph John Rizza and Wil-[fol. 21] liam Raynard Nicholson, were arrested by five officers of the Anne Arundel County Police Department on May 21, 1952, in a two-room building in the rear of a garage along the Governor Ritchie Highway at Brooklyn. When the police officers appeared on the scene, the front door was open but the door to the rear room was locked. They rapped on the door to the rear room, but, as no one answered, they broke the door open with an ax. Upon entering the room they arrested defendants and seized three telephones, two adding machines, racing forms and other paraphernalia. While the officers were in the building many telephone calls came from persons wanting to make bets.

Before the trial defendants filed motions to suppress the evidence and dismiss the proceedings. It was conceded that the police officers raided the building without a search warrant and that they seized the gambling paraphernalia il-

legally. Defendants contended that the 1951 amendment of the Bouse Act violates the Fourteenth Amendment of the Constitution of the United States, and that the paraphernalia were inadmissible under the Bouse Act as it stood before the amendment. The Court overruled the motions and admitted the paraphernalia in evidence. The Court thereupon found both defendants guilty and sentenced each to the Maryland House of Correction for six months and to pay a fine of $1,000.

On December 13, 1952, the Court of Appeals held, in an opinion by Chief Judge Marbutt, that Bisso and Nicholson could not complain of the illegality of the search and seizure, because they had no interest in the raided premises. Salzberg, on the other hand, testified that he was lessee of the building at the time of the raid. Therefore, the paraphernalia would be admissible as to him only in case the 1951 statute is valid. We ordered a reargument of his appeal on the question of the constitutionality of the statute. Bisso v. State, Md., 92 A. 2d 220.

Prior to the enactment of the Bouse Act in 1920, this Court held that where evidence offered in a criminal trial is otherwise admissible, it will not be rejected because it was obtained illegally. Meisinger v. State, 155 Md. 195, 141 A. 523, 142 A. 190; Hayward v. State, 161 Md. 685, 158 A. [fol. 22] 307; Bean v. State, 163 Md. 153, 161 A. 244. This is still the rule in prosecutions for felonies in this State. Marshall v. State, 182 Md. 379, 35 A. 2d 115; Delnegro v. State, Md., 91 A. 2d 241, 244. The Bouse Act changed the rule only in trials for misdemeanors.

We find no reason to hold that the 1951 statute, making illegally procured evidence admissible in certain trials in Anne Arundel County, is in conflict with the Fourteenth Amendment of the Federal Constitution or Article 23 of the Maryland Declaration of Rights. It is true that in Weeks v. United States (1914), 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, the United States Supreme Court held that evidence obtained in violation of the Fourteenth Amendment is inadmissible in the Federal courts. But in Wolf v. People of tate of Colorado (1949), 338 U. S. 25, 69 S. Ct. 1359, 1361, 93 L. Ed. 1782, the Court explicitly stated that in a prosecution in a State court for a State

crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

In explanation of the rule, Justice Frankfurter made the following comment: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. * * * Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantative solution."

Appellant vigorously protested that the statute, partially exempting Anne Arundel County from the operation of the Bouse Act, will tend to give encouragement to the county police to violate the law by invading private homes to make searches and seizures without a warrant. A similar protest was made by the defendant in People v. Defore (1926), 242 N. Y. 13, 150 N. E. 585, 588, 589, but the Court of Ap-[fol. 23] peals of New York announced that it preferred the State rule to the Federal rule. In that case Judge Cardozo said in the opinion of the Court: "We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequence would be. The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crime the most flagitious. * * * We do not know whether the public, represented by its juries, is to-day more indifferent to its liberties than it was when the immunity was born. If so, the change of sentiment without more does not work a change of remedy. Other sanctions, penal and disciplinary, supplementing the right to damages, have already been enumerated. No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the govern-

ment were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice."

We now pass to the important question whether appellant was denied the equal protection of the laws when the Circuit Court for Anne Arundel County, in accordance with the 1951 statute, admitted illegally procured evidence against him at his trial for gambling, while the law makes illegally procured evidence inadmissible in trials for the same offense in twenty counties and the City of Baltimore.

Ever since the beginning of our Government, American political philosophy has been based upon principles of equality. Protection from unequal operation of the laws entitling a person to like privileges and burdens accorded to other persons in like circumstances is a basic American concept. It was thus natural that this concept was expressed in the guaranty of protection from arbitrary and unjust disparity of treatment contained in Federal and State Constitutions. The constitutional guaranty of equality is construed, however, to give full play to the powers of government so long as the exercise of those powers is clearly not an infringement of the rights of citizens.

[fol. 24] The principal guaranty of equality in American Constitutions is the clause in the Fourteenth Amendment to the Federal Constitution which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This amendment was proclaimed to be in force July 28, 1868. It was nearly five years afterwards when the Supreme Court construed the Amendment in the Slaughter-House Cases (1873), 16 Wall. 36, 81, 21 L. Ed. 394, 410. The Amendment had been submitted to the people to give protection to the Negroes, who had been recently emancipated, but those cases raised questions of the extent of the police power of the State and the granting of a monopoly. The Legislature of Louisiana had granted a monopoly of the slaughter-house business in New Orleans in favor of one corporation, thereby depriving many citizens

of the right to engage in that business. The Court held that the statute did not violate any provision of the Fourteenth Amendment and that the subject of local monopoly was for the States, not for the Federal Government, to deal with. In referring to the Equal Protection Clause, Justice Miller said in the opinion of the Court: "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. * * * We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

That prophecy proved to be false. The majority of the litigants who have invoked the Equal Protection Clause have charged discrimination in economic legislation, rather than race discrimination. It is now universally recognized that the Equal Protection Clause guarantees that equal protection shall be given to all persons under like circumstances in the enjoyment of their civil and personal rights; that all persons are equally entitled to acquire and enjoy property; that they shall have like access to the courts of the country; that no impediment shall be interposed to the pursuits of any person except as applied to the same pursuits by others under like circumstances; and that no greater burdens shall be laid upon one than are laid upon [fol. 25] others in the same calling and condition. Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.

It has been held that the power of the Legislature to regulate a busines or occupation cannot be exercised arbitrarily or in such a manner as to deprive a citizen of rights, privileges, or property to which he is entitled as a matter of natural justice, except for the protection of some substantial public interest; nor can such power be exercised in such a manner as to impose upon members of a selected class burdens which are not shared by others in like circumstances. In so far as a statute grants privileges to or places burdens upon an individual, or limits his rights, especially his right to engage in a particular business or occupation, a statute may be invalidated by an arbitrary or unreason-

able classification or discrimination in respect to territory. Herbert v. County Com'rs of Baltimore County, 97 Md. 639, 644, 55 A. 376; Watson v. State, 105 Md. 650, 655, 66 A. 635; Clark v. Harford Agricultural & Breeders' Ass'n, 118 Md. 608, 620, 85 A. 503; Criswell v. State, 126 Md. 103, 109, 94 A. 549. The classification must be reasonable and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, and the law shall apply equally to all persons similarly situated within the territory described in the act. Ocampo v. United States, 234 U. S. 91, 34 S. Ct. 712, 715, 58 L. Ed. 1231; Royster Guano Co. v. Commonwealth of Virginia, 253 U. S. 412, 40 S. Ct. 560, 64 L. Ed. 989; Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387, 47 S. Ct. 595, 597, 71 L. Ed. 1112. The classification is presumed to be reasonable in the absence of clear and convincing indications to the contrary, and the person attacking the classification has the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369.

In State v. Shapiro, 131 Md. 168, 173, 101 A. 703, it was held by this Court that a statute requiring different rates of license fees for the privilege of dealing in junk, according to the population of the county or city in which the business is conducted, does not deny any person the equal protection of the laws. On the contrary, in Dasch v. Jackson, [fol. 26] 170 Md. 251, 269, 183 A. 534, the Court held that a statute providing for the licensing and regulation of paperhangers in the City of Baltimore denied equal protection of the laws, because it had no substantial relation to the public health or safety and there was no rational basis for the territorial classification. Likewise, we held that the Strip Mining Act, Laws 1947, Sp. Sess., ch. 16, which discriminated between operators of coal mines in Garrett County and those in Allegany County, was unconstitutional because there was no difference in the conditions in the two counties that would make strip mining a menace to public health and safety in Allegany but harmless in Garrett, and there was no rational basis for the territorial classification and no justification for the discrimination. Maryland Coal

& Realty Co. v. Bureau of Mines of State, 193 Md. 627, 69 A. 2d 471.

These principles have been recognized in cases dealing with statutes imposing licenses, taxes and other burdens in the exercise of the police power of the State. But those statutes are quite different from the statute now before us. This statute does no more than prescribe a rule of evidence.

It is true that one of the intermediate courts in New York has held that where a statute dealing with bastardy proceedings in all parts of the State outside of the City of New York permitted testimony of the defendant as to access by others without corroboration, another statute requiring corroboration of such testimony in proceedings brought in the City of New York was unconstitutional. Commissioner of Public Welfare v. Torres, 263 App. Div. 19, 31 N. Y. S. 2d 101. We are unwilling to base our decision on that opinion. The Equal Protection Clause contemplates the protection of persons or classes of persons against unjust discrimination by the State, but it has no reference to municipal or territorial arrangements made for different portions of the State that do not injuriously affect or discriminate between persons or classes of persons within the municipalities or counties for which such regulations are made. The State can establish any system of laws it sees fit for all or any part of its territory, provided that it does not encroach on the jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United [fol. 27] States, or deprive any person of due process of law or equal protection of the laws. Thus it has been held that the Legislature has the power to declare that certain acts are criminal in some counties but not in others. Davis v. State, 68 Ala. 58, 44 Am. Rep. 128, 132; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124. For instance, the equal protection of the laws is not denied by a State local option law under which the traffic in intoxicating liquors may be made a crime in certain territory and permitted elsewhere. State of Ohio ex rel. Lloyd V. Dollison, 194 U. S. 445, 24 S. Ct. 703, 48 L. Ed. 1062.

In emphasizing the right of the State to establish its own system of laws, Justice Bradley said in State of Missouri v. Lewis (1880), 101 U. S. 22, 25, L. Ed. 989, 992: "If the State

of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. * * * If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause of the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

It has always been the policy of the State of Maryland to permit the enactment of local laws affecting only one county or the exemption of particular counties from the operation of general laws or some provisions thereof. Stevens v. State, 89 Md. 669, 674, 43 A. 929, 931; Neuenschwander v. Washington Suburban Sanitary Commission, 187 Md. 67, 48 A. 2d 533, 600. Moreover, the right of a citizen to have his controversies determined by existing rules of evidence [fols. 28-30] is not a vested right. Rules of evidence relate to the remedies which the State provides for its citizens, and, like other rules affecting the remedy, they are subject at all times to modification by the Legislature. Mobile, Jackson, & Kansas City R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78; Luria v. United States, 231 U. S. 9, 34 S. Ct. 10, 58 L. Ed. 101. Rules of evidence are not a constituent part of any contract and are not of the essence of any right which a party may seek to enforce. Generally speaking, therefore, the State, having the right to control procedure in its courts, has the power to regulate the admissibility of evidence without denial of equal protection of the laws. Illinois Central R. Co. v. Paducah Brewery Co.,

157 Ky. 357, 163 S. W. 239, 242. We, therefore, conclude that the statute assailed by appellant does not violate the Equal Protection Clause.

For these reasons we hold that the paraphernalia, although procured by illegal search and seizure, were admissible. As we find no error in the ruling of the trial Court, the judgment of conviction will be affirmed.

Judgment affirmed, with costs.

Filed: February 5, 1953.

[fol. 31] IN COURT OF APPEALS OF MARYLAND

(DOCKET ENTRIES)

[Title omitted]

Three appeals in one record from the Circuit Court for Anne Arundel Co.

Filed: July 14, 1952.

July 24, 1952, Transcript of testimony rec'vd. and inserted in original record.

Dec. 12, 1952, Judgment affirmed with costs as to Rizzo and Nicholson. Reargument of constitutional question only ordered as to Salsburg.

Opinion filed. Op. Markell, C. J.

(Appeal as to Salsburg reargued Jan. 14, 1953)

Feb. 5, 1953, Judgment affirmed, with costs.

Opinion filed. Op. Delaplaine, J.

Mar. 5, 1953, Petition and Order Staying Mandate filed pending decision from United States Supreme Court.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 32] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Simon E. Sobeloff, Chief Judge of the Court of Appeals of Maryland:

Considering himself aggrieved by the final decision and judgment of the Court of Appeals of Maryland dated and entered February 5, 1953, in the above entitled case, Julius Salsburg, Appellant in this case, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decision and judgment in order that the same may be examined and reversed; that citation be issued in accordance with law; that an order be made with respect to the fixing of the amount of the appeal bond for the proper security for costs; and that the material parts of the record, proceedings and papers upon which said final decision and judgment was based, duly authenticated by the Clerk of the Court of Appeals of Maryland, be sent to the Supreme Court of the United States in accordance with the Rules in such case made and provided.

Petitioner files and presents herewith his Assignment of Errors and Statement of Jurisdiction as required by the Rules of the Supreme Court of the United States.

Respectfully submitted, Herbert Myerburg, Joseph Leiter, Louis M. Strauss, Attorneys for Appellant.

[fol. 33] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

Julius Salsburg, Appellant in the above entitled cause, in connection with his appeal to the Supreme Court of the United States, hereby files the following Assignment of Errors upon which he will rely in his prosecution of said appeal from the final decision and judgment of the Court of

Appeals of Maryland entered herein on February 5, 1953.

The Court of Appeals of Maryland erred:

1. In holding that Chapter 704 of the Acts of the Maryland Legislature of 1951, amending Chapter 194 of the Acts of 1929, popularly known as the Bouse Act, (both of said laws being codified in Article 35, Section 5, Maryland Code, 1951 edition), does not violate the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States.

a. In explanation of this and the subsequent Assignment of Errors, Appellant desires to point out that the original Bouse Act (Ch. 194, Acts of 1929) rendered inadmissible in a trial of a misdemeanor any evidence procured as a result of an illegal search and seizure. Prior to the enactment of this statute, the common law of Maryland was that where evidence offered in a trial of either a misdemeanor or a felony is otherwise admissible, it will not be rejected because it was obtained illegally. This statute, as originally enacted, [fol. 34] was state-wide in its application. The challenged statute (Ch. 704, Acts of 1951) amended this statewide law by providing that nothing contained therein shall prohibit the use of illegally obtained evidence in the prosecution of a violation of the gambling laws of the State of Maryland (the same being a misdemeanor) in Anne Arundel County, one of the 23 counties of the State of Maryland.

(At the same session of the Maryland Legislature in 1951, the challenged statute was further amended by Chapter 710 so as to include Wicomico and Prince George's Counties in the exemption from the otherwise state-wide evidentiary rule of exclusion.)

2. In holding that the Appellant was not denied the Equal Protection of the Law under Section 1 of the 14th Amendment of the Conntitution of the United States by the admission in evidence against him at his trial for gambling (a misdemeanor) in the Circuit Court for Anne Arundel County (in accordance with Chapter 704 of the Acts of 1951) of illegally procured evidence, notwithstanding the law renders illegally procured evidence inadmissible in trials for the same offense elsewhere in the State of Maryland, namely, in 20 of the 23 Counties of the State and in Baltimore City,

which City is an autonomous municipality not within any County.

3. In holding that the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States has no reference or application to municipal or territorial arrangements made for different portions of the State where the law applies to all persons or classes within the municipalities or counties for which such regulations are made, notwithstanding the territorial classification in question is arbitrary and does not rest upon any reasonable ground of difference having a fair and substantial relation to the object of the legislation.

[fol. 36] 4. In holding that the secondary classification contained in Chapter 704 of the Acts of 1951, whereby it was made operative only against persons charged with the misdemeanor of "gambling" in Anne Arundel County but not against persons charged with any other misdemeanor in said County, does not violate the Equal Protection Clause of Section 1 of the 14th Amendment to the Constitution of the United States.

5. In holding that Chapter 704 of the Acts of 1951 does no more than prescribe a rule of evidence to which the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States does not apply and rejecting the Appellant's contentions that (a) where rules of evidence are made the subject of territorial classification the discrimination involved must be supported by a reasonable ground of difference between conditions in the territory selected and conditions in the territory not affected by the statute, and that (b) the subject matter of the challenged statute does more than prescribe a rule of evidence in that it impinges upon a fundamental right which is implicit in the concept of ordered liberty.

6. In holding that a presumption of reasonableness and constitutionality attended Chapter 704 of the Acts of 1951 and rejecting the Appellant's contention that no such presumption applied because the subject matter of the challenged statute impinges upon a fundamental right which is implicit in the concept of ordered liberty.

7. In affirming the action of the trial court which overruled Appellant's motion made prior to trial on the merits

to suppress the evidence illegally obtained and over-ruled Appellant's objections at the trial on the merits to the introduction of said evidence.

Wherefore, on account of the errors so assigned, Julius Salsburg, Appellant, prays that the said final decision and [fols. 36-64] judgment of the Court of Appeals of Maryland, dated and entered on February 5, 1953, be reversed, and for such other relief as the Court may deem fit and proper.

Herbert Meyerberg, Joseph Leiter, Louis M. Strauss,
Attorneys for Appellant.

[fol. 65] In the Court of Appeals of Maryland

[Title omitted]

Order Allowing Appeal to the Supreme Court of the United States and Fixing Amount of Bond for Costs—March 26, 1953.

The Petition of Julius Salsburg, Appellant in the above entitled case, for the allowance of an appeal in this case to the Supreme Court of the United States from the final decision and judgment of the Court of Appeals of Maryland dated and entered February 5, 1953, having been presented herein, accompanied by Petitioner's Assignment of Errors and prayer for reversal and the Statement as to the Jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the Clerk of the Court of Appeals of Maryland shall, within forty (40) days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the Court of Appeals of Maryland, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with

Rule 10, and such other rules as may be pertinent, of the Rules of the Supreme Court of the United States.

[fols. 66-87] It is further ordered that Petitioner shall give a good and sufficient cost bond in the sum of Two Hundred-fifty ($250.00) Dollars, conditioned that he shall prosecute said appeal to effect and answer all damages and costs if he fails to make his plea good.

And it is further ordered that citation shall issue in accordance with law.

Dated March 26, 1953.

Simon E. Sobeloff, Chief Judge of the Court of Appeals of Maryland.

[fol. 88] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 39

JULIUS SALSBURG, Appellant,

vs.

STATE OF MARYLAND, Appellee

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed April 16, 1953

1. Appellant adopts for his statement of points upon which he intends to rely in his appeal to this Court the points contained in his Assignment of Errors heretofore filed.

2. Appellant designates the following parts of the record herein for printing by the Clerk of this Court:

a. Appendix to brief of Appellant. (R. 1-15)
b. Two opinions of the Court of Appeals. (R. 16-28)
c. Docket entries of the Court of Appeals. (R. 31)
d. Petition for appeal. (R. 32)

e. Assignment of Errors. (R. 33-36)
f. Order allowing appeal. (R. 65-66)

Baltimore, Maryland.

Date: April 15, 1953.

Herbert Myerberg, Joseph Leiter, per HM, Munsey V. Balto, Louis M. Strauss, Attorneys for Appellant.

[fols. 89-90] Proof of service—(omitted in printing.)

[fol. 91] Supreme Court of the United States, October Term, 1953

No. 38

Julius Salsburg, Appellant,

vs.

State of Maryland

Order Noting Probable Jurisdiction—May 18, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

INDEX

Subject Index

Table of Cases Cited

Statutes Cited

MISCELLANEOUS CITATIONS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 712

JULIUS SALSBURG,

Appellant,

vs.

STATE OF MARYLAND

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendant-appellant submits herewith his statement particularly disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction on appeal to review the decision and judgment entered in this cause by the Court of Appeals of Maryland, the highest court in the State of Maryland.

Opinions Below

The first opinion of the Court of Appeals of Maryland, which decided that the constitutionality of the challenged statute was squarely presented for decision in the case of this appellant, is reported in 93 A. 2d 280. The second opinion of the Court of Appeals of Maryland, which decided

in favor of the validity of the challenged statute, is reported in 94 A. 2d 280. Both of said opinions are attached hereto as Appendix A.

Jurisdiction

The final judgment of the Court of Appeals sought to be reviewed was entered on February 5, 1953, being the same day on which the second opinion in the case was filed. The first opinion in the case was filed on December 12, 1952. The date the application for appeal to the Supreme Court is presented is March 26, 1953.

In this case there was drawn in question the validity of a statute of the State of Maryland, hereinafter set forth, on the ground of its being repugnant to Section 1 of the 14th Amendment of the Constitution of the United States. The appellant was on trial in the Circuit Court for Anne Arundel County charged with committing a misdemeanor by violating the gambling laws of the State of Maryland which prohibit the making of book on the result of horse races. The admissibility of the evidence upon which appellant was ultimately convicted depended upon the constitutional validity of the challenged statute, and the decision and judgment of the Court of Appeals of Maryland (being the highest court in the State) were in favor of its validity. The jurisdiction of the Supreme Court to review this decision and judgment by appeal is conferred by Title 28, United States Code, Section 344(a) (28 U. S. C. A. 1257(2)). The following decisions sustain the jurisdiction of the Supreme Court to review the decision and judgment on appeal in this case: *Ward* v. *Maryland*, 12 Wall. 418, 423, 424 (1871); *Home Insurance Co.* v. *Augusta, Ga.*, 93 U. S. 116, 121 (1876); *Foster* v. *Kansas*, 112 U. S. 201, 205, 206 (1884); *Cissna* v. *Tennessee*, 246 U. S. 289, 293, 294 (1918); *Chicago, R. I. & P. R. Co.* v. *Perry*, 259 U. S. 548, 551, 552 (1922); *New York* v. *Zimmerman*, 278 U. S. 63, 67-69.

(1928); *Charleston Fed. Sav. & L. Assoc.* v. *Alderson*, 324 U. S. 182, 185-186 (1945); *Illinois* v. *Board of Education*, 333 U. S. 203, 206 (1948); *Kedroff* v. *St. Nicholas Cathedral*, 97 L. Ed. (Advance) 95, 98 (1952).

The federal questions sought to be reviewed were raised at the time and in the manner hereinafter set forth, namely:

a. They were raised in the trial court on June 13, 1952, by the appellant's filing of a motion to suppress the evidence, which said motion was heard on the same day prior to the trial on the merits.

Paragraph 4 of said motion to suppress specifically referred to the evidence as having been "illegally obtained from your Petitioner as the result of an illegal and improper search and seizure, guaranteed the Defendant under the Maryland State and United States Constitutions, as well as the existing State Laws relative to search and seizure and search warrants relating thereto" (R. 5). Prior to hearing testimony on the preliminary motion to suppress, the trial court said:

> "* * * If they [the police] had a right, assuming that the Bouse Act [the state-wide statute excluding illegally procured evidence in the trial of misdemeanors] had been amended *and that amendment was validated*, they wouldn't have to worry about a misdemeanor or the commission of any kind, they would have the right to go into the premises on the assumption the amendment of the Bouse Act gave them that right. * * *" (Italics supplied) (Appendix to appellant's brief in the Court of Appeals of Maryland, p. 5).

At the conclusion of the preliminary hearing, the trial court over-ruled appellant's motion to suppress (R. 14).

b. They were further raised in the trial court on June 13, 1952, during the trial on the merits by timely objection to the introduction of the evidence (R. 49-54 of trial record).

(Stenographic transcript of the testimony filed in the Court of Appeals of Maryland, pp. 10-15).

c. In the Court of Appeals of Maryland the federal questions sought to be reviewed were raised in the customary manner in appellant's printed brief filed in that Court and in the oral argument of his counsel, before the Court of Appeals of Maryland. In appellant's printed brief (p. 2), the federal questions were submitted as follows:

> "Is Chapter 704 of the Acts of 1951, which purports to amend the Bouse Act (Art. 35, Sec. 5, Md. Code, 1947, Suppl.) by making its provisions inapplicable to gambling cases in Anne Arundel County, Constitutional?
>
> "* * * Appellants contend * * * * * * * there is no rational basis or justification for the territorial classification made by the Act, which discriminates between Anne Arundel County and all other parts of the State with respect to the subject matter of the statute in question; and, therefore, it violates the equal protection clause of the 14th Amendment to the Federal Constitution and Article 23 of the Maryland Declaration of Rights."

d. In its first opinion and decision filed December 12, 1952, the Court of Appeals of Maryland noticed the federal questions sought to be reviewed and said (93 A. 2d at p. 282):

> "The question of the constitutionality of Chapter 704 is therefore presented for decision in Salsburg's case. We have decided to order a reargument on this constitutional question alone in Salsburg's case. * * *
>
> "* * * Reargument of constitutional question only ordered as to Salsburg."

e. Pursuant to the above mentioned Order for reargument, appellant's counsel filed an additional printed brief in the Court of Appeals of Maryland elaborating his contentions on the federal questions now sought to be reviewed

and particularly stressing the necessity for the finding of a "reasonable ground of difference" in order to sustain the constitutional validity of the territorial classification made by the challenged statute. Appellant's counsel also reargued orally before the Court of Appeals of Maryland the federal questions now sought to be reviewed.

f. In its second opinion and decision filed February 5, 1953, the Court of Appeals of Maryland sustained the constitutional validity of the challenged statute by saying:

> "Therefore, the paraphernalia would be admissible as to him [Salsburg, the present appellant] only in case the 1951 statute is valid. [94 A. 2d at p. 282]
>
> • • • • • • •
>
> "We now pass to the important question whether appellant was denied the equal protection of the laws when the Circuit Court of Anne Arundel County, in accordance with the 1951 statute, admitted illegally procured evidence against him at his trial for gambling, while the law makes illegally procured evidence inadmissible in trials for the same offense in twenty counties and the City of Baltimore.
> [94 A. 2d at p. 283]
>
> • • • • • • •
>
> "We, therefore, conclude that the statute assailed by appellant does not violate the Equal Protection Clause.
>
> "For these reasons we hold that the paraphernalia, although procured by illegal search and seizure, were admissible. As we find no error in the ruling of the trial Court, the judgment of conviction will be affirmed" (94 A. 2d at p. 285).

As hereinbefore stated, the Court of Appeals of Maryland is the highest Court of last resort in the State of Maryland. The judgment of said Court was entered on February 5, 1953, in the following terms: "Judgment affirmed, with

costs" (94 A. 2d at p. 285), and the same is a final judgment.

Questions Presented

1. Is it a violation of the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States for the Legislature of Maryland to amend a statute of state-wide application, which renders inadmissible in the trial of a misdemeanor any evidence procured as a result of an illegal search and seizure, by providing that such evidence shall be admissible in such a trial in a single county of the State, where no reasonable ground of difference exists between conditions in the territory selected for exemption and conditions elsewhere in the State?

2. Was the appellant denied the Equal Protection of the Laws under Section 1 of the 14th Amendment to the Constitution of the United States by the admission in evidence against him at his trial for a misdemeanor in the Circuit Court for Anne Arundel County (in accordance with the exemption contained in the amendatory statute now being challenged) of illegally procured evidence, notwithstanding the law renders illegally procured evidence inadmissible in trials for the same offense elsewhere in the State of Maryland.

3. Was the appellant denied the Equal Protection of the Laws under Section 1 of the 14th Amendment to the Constitution of the United States by the admission in evidence against him at his trial for the misdemeanor of "gambling" in Anne Arundel County (in accordance with the exemption contained in the challenged statute) of illegally procured evidence notwithstanding the law renders illegally procured evidence inadmissible in trials for all other misdemeanors in the same County?

4. Does the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States

apply so as to prohibit a State from making territorial classifications for the administration of justice and judicial procedure for different portions of the State, which said classifications are arbitrary, do not rest upon some reasonable ground of difference between conditions in the territory selected and conditions elsewhere in the State and do not bear a fair and substantial relation to the object of the legislation?

5. Does the subject matter of the challenged statute impinge upon a fundamental right implicit in the concept of ordered liberty so that it is not entitled to the same presumption of reasonableness and constitutionality which usually attends other types of legislation?

6. All the points raised in the Assignment of Errors are also presented. The Questions Presented as stated above set forth the major issues.

Statute Involved

The Maryland statute involved, the validity of which was sustained by the Court of Appeals of Maryland, is Acts of 1951, Chapter 704, which, as further amended by Acts of 1951, Chapter 710, is codified as Article 35, Section 5, Code of Public General Laws of Maryland, 1951 edition. The pertinent provisions of said statute are as follows:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case; * * *. Provided, further that nothing in this section shall prohibit the use of such evidence in Anne Arundel, *Wicomico and Prince George's*

Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 330-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title." (Italics supplied.)

The words italicized, which brought Wicomico and Prince George's Counties within the exemption of the proviso, were added by Acts 1951, Chapter 710. The proviso itself was originally enacted by the challenged statute (Acts 1951, Chapter 704) as an amendment to the then existing law, and, as so enacted, it applied only to Anne Arundel County.

Statement of the Case

The appellant was convicted by the Circuit Court of Anne Arundel County of committing a misdemeanor by violating the gambling laws of the State of Maryland which prohibit the making of book on the result of horse races. The evidence upon which he was convicted was admittedly procured as a result of an illegal search and seizure by the police of Anne Arundel County, and its admissibility was dependent upon the constitutional validity of the challenged statute.

Prior to the trial on the merits, appellant filed a motion to suppress the evidence. The testimony taken in support of the motion disclosed that on the afternoon of May 21, 1952, Captain Wilbur C. Wade, of the Anne Arundel County Police force, in company with other officers, approached a small one room building in the rear of a certain garage situated on the Governor Ritchie Highway, Anne Arundel County, Maryland. It was stipulated that no search warrant had been issued for the invasion of these premises. The door to the premises was locked. Captain Wade admitted that he could not see into the premises because the window was painted, and that he could not hear any sounds

coming from the room. All that the officers saw were some telephone wires leading into the premises. They tried to get someone to come to the door and open it, but no one answered. The police then forced the door open with an axe. The appellant was found in the room. A search of the room revealed incriminating evidence which was seized by the police. Captain Wade made no pretense at justifying his forceable entry into the premises on the basis of any preliminary sensory discovery indicating commission of a crime. He frankly admitted that he broke into the room solely "upon the advice of the State's Attorney" (R. 8-10).

The trial Court in stating the problem before it said that if the challenged statute were valid the police "would have *a right to go into the premises* on the assumption the Amendment of the Bouse Act *gave them that right.*" (Italics supplied.) (R. 7). Thereafter the trial Court overruled the motion to suppress the evidence, impliedly holding that the challenged statute was constitutional. (See 93 A. 2d at p. 282, where the Court of Appeals of Maryland said: "The fair implication * * * is that the motions were overruled because the act was held constitutional * * *.")

At the trial on the merits the timely objections of appellant to the introduction of the evidence were overruled. The trial Court, sitting without a jury, found appellant guilty as charged and sentenced him to six months in the Maryland House of Correction and to pay a fine of one thousand dollars and costs.

The appellant had been tried jointly with two other defendants (Joseph John Rizzo and Wm. Raymond Nicholson), who were also convicted and who received the same sentence, and all three defendants perfected an appeal to the Court of Appeals of Maryland. In the first opinion of the Court of Appeals of Maryland (93 A. 2d 280), the

judgment and sentence of the trial Court was affirmed as to the other two defendants because it was held that they had no interest in the premises searched and therefore had no status to object to the illegal search and seizure. The appellant, Julius Salsburg, however, was found to have a proper interest in the premises and the constitutional question only was ordered reargued as to him. Following the reargument, the Court of Appeals of Maryland held the challenged statute valid and affirmed the judgment and sentence as to the present appellant, Julius Salsburg. The present appeal, therefore, is solely on behalf of Julius Salsburg.

The Questions Are Substantial

For the sake of clarity in presenting appellant's contention that the questions involved in this appeal are substantial, it is deemed desirable to trace briefly the history of the challenged statute.

Prior to the enactment of Chapter 194, Acts of 1929 (now codified, as subsequently amended, in Art. 35, Sec. 5, Md. Code, 1951) the Maryland Court of Appeals rejected the federal rule of exclusion of illegally procured evidence, and such evidence was admitted in criminal trials involving all categories of crime. *Meisinger* v. *State*, 155 Md. 195 (1928). As a result of this decision, the Legislature enacted Chapter 194 of the Acts of 1929, popularly known as the Bouse Act. This statute, which was state-wide in its application, rendered such evidence inadmissible in the trial of all misdemeanors, thus partially adopting the federal rule of exclusion. As to prosecutions for felonies the old rule of admissibility remained the same and is still in force. *Marshall* v. *State*, 182 Md. 379 (1943); *Delnegro* v. *State*, 81 A. 2d 241 (Md. 1951). Thus Maryland adopted a hybrid position on the important question of how best to secure

to the citizen his fundamental right of security against arbitrary intrusion upon his privacy by the police.

Following the enactment of the Bouse Act, the Court of Appeals of Maryland characterized it by saying that it "fairly summed up" the immunities guaranteed by Articles 22 and 26 of the Maryland Declaration of Rights, which are in *pari materia* with the 4th and 5th Amendments to the Constitution of the United States. *Bass* v. *State*, 182 Md. 496, 500 (1943). Somewhat earlier, the same Court warned that "An examination of the statute books of the Federal Government and the states demonstrates the necessity for these constitutional barriers because they indicate a ceaseless steady pressure on the part of government to lessen the difficulty of convicting persons charged with crime by encroaching on these immunities". *Miller* v. *State*, 174 Md. 362, 370 (1938). The "ceaseless pressure" alluded to was successfully resisted in Maryland for almost 20 years after the enactment of the Bouse Act. However, in 1947 a small hole was made in the partial dike erected by the Bouse Act when the Baltimore County Delegation in the Maryland Legislature succeeded in securing the enactment of Chapter 752 of the Acts of 1947, which amended the Bouse Act so that—"nothing in this section shall prohibit the use of such evidence in Baltimore County in the prosecution of any person for unlawfully carrying a concealed weapon". At the 1951 session of the Legislature, other local delegations succeeded in enlarging the breach by securing the enactment of Chapter 145 of the Acts of 1951, whereby Baltimore City and thirteen counties joined Baltimore County in the exemption of concealed weapons cases. At the same session the Anne Arundel County delegation secured the passage of the amendatory statute now being challenged (Ch. 704, Acts 1951) and the Wicomico and Prince George's Counties delegations joined

Anne Arundel County by securing the passage of Chapter 710 of the Acts of 1951. At the 1952 session of the Maryland Legislature Chapter 59 of the Acts of 1952 was enacted whereby a new section was added to the law, making the exemption from the Bouse Act of concealed weapons cases state-wide in its application (Art. 35, Sec. 5A, Md. Code, 1951). There are no recorded legislative debates pertaining to Chapter 59 of the Acts of 1952 disclosing the considerations which prompted its passage. However, it is a fair statement to say that its purpose was to make the "concealed weapons" exemption from the Bouse Act state-wide in its application in order to eliminate any question of a violation of the Equal Protection Clause of the 14th Amendment of the Constitution of the United States. The point had never been formally raiscd and adjudicated, but many leading members of the Maryland Bar had often expressed serious doubts on the point. (For a similar legislative procedure, making a special rule of evidence in paternity cases state-wide in its application after a statute confining its operation to New York City had been declared unconstitutional by an intermediate appellate court, see *Commissioner of Public Welfare* v. *Koehler*, 30 N.E. 2d 587, 590 (N. Y. 1940), referring to *Krushel* v. *Ladutko*, 11 N. Y. S. 2d 747, 749.)

In the case at Bar, the only statute before the Court is Chapter 704 of the Acts of 1951 which involves a double classification. The first or primary classification is territorial in its effect by exempting one County of the State from the state-wide statutory rule of exclusion of illegally procured evidence. The secondary classification selects for discrimination violations of the "Gaming" laws, leaving all other misdemeanors committed within the one County in question subject to the state-wide rule of exclusion. No question is involved here as to the power of the State of

Maryland to repeal *in toto* the legislative evidentiary rule of exclusion embodied in the Bouse Act, and thereby revert to the former judicial rule of inclusion for misdemeanor cases as well as for felonies. Such action would not involve class legislation with the concomitant necessity, as in the case at Bar, of finding a "reasonable ground of difference" to support the discrimination inherent in the challenged statute. In the case at Bar, the basic challenge to the statute involved is grounded upon the fact that both the primary and secondary classifications which it makes are arbitrary and without any rational basis to support them, and, therefore, it deprives the appellant of the equal protection of the laws as provided in Section 1 of the 14th Amendment of the Constitution of the United States.

1. At the two oral arguments in the Court of Appeals of Maryland, it was virtually conceded by the State that there was no difference between conditions in Anne Arundel County and elsewhere in the State which would furnish a reasonable basis for the discrimination inherent in the challenged statute. The principal contention of the State was that the only authorities in point here are those dealing with the right of a State to make territorial discriminations in regulating the administration of justice and judicial procedure within its boundaries. The State's greatest reliance was upon *Missouri* v. *Lewis*, 101 U. S. 22 (1880) and the decisions of the Supreme Court which have cited and followed it. From these decisions, the State distilled a principle, the essence of which is that in cases involving the administration of justice and judicial procedure the admitted *power* to set up territorial classifications is not subject to the otherwise basic requirement that class legislation must not be arbitrary and must be founded upon a reasonable difference between conditions in the territory selected and

elsewhere in the State. The Court of Appeals of Maryland adopted this distorted view of *Missouri* v. *Lewis*. In sustaining the statute now challenged, the Court, relying upon *Missouri* v. *Lewis*, expressly held that the Equal Protection Clause of the federal Constitution, "has no reference to municipal or territorial arrangements made for different portions of the State" (94 A. 2d at p. 284). After making this flat statement, the Court sought to temper its clear implication by paying lip service to the requirement of "reasonableness". The arrangements in question should not, the Court added, "injuriously affect or discriminate between persons or classes of persons within the municipalities or counties for which such regulations are made" (Ibid.). However, the Court made no attempt to point out any possible difference between conditions existing in Anne Arundel County and elsewhere in the State. Nor did it make even a passing reference to any possible difference in Anne Arundel County between various misdemeanors which might justify treating persons charged with gambling in that County differently from those malefactors who operate bawdy houses, illegal stills or engage in a conspiracy to commit the most heinous crime there (all being misdemeanors).

This clear misinterpretation of *Missouri* v. *Lewis* demonstrates the substantiality of the questions presented by this appeal. In that case, the Supreme Court of the United States sustained the validity of Missouri statute and constitutional provision which allowed an appeal to the highest court of that State from a final judgment of the Circuit Courts of certain Counties. Other Counties were excepted from these provisions, and a separate appeal court was provided for them. The language of the opinion, which was relied upon by the Court of Appeals of Maryland in the case at Bar, was nothing more than an abstract statement of the principle which sustained the *power* to set up terri-

torial classifications and which, for the purpose of its statement, ignored or rather assumed the requirement that there be some reasonable basis for the discrimination. The abstract statements contained in *Missouri* v. *Lewis*, which have been frequently quoted and relied upon, are authority only for the *power* to classify, and they have no bearing on the important question of *reasonableness*. In any case of classification, whether the subject matter of the legislation involves taxation, licensing, economic activities or judicial administration and procedure, two questions are invariably presented and must be determined. The first question is the *power* to classify and the second is the *reasonableness* of the particular classification. In the case at Bar, the Court of Appeals of Maryland correctly held that the *power* to classify existed but erroneously concluded that since the subject matter of the challenged statute related to judicial administration and procedure it was not necessary to find *reasonableness* because the Equal Protection Clause of the federal Constitution does not apply to such territorial arrangements.

Missouri v. *Lewis* does not support such a conclusion. Indeed practically all the Supreme Court decisions which cite and rely upon *Missouri* v. *Lewis* either assume "reasonableness" of the classification without discussion because it was immediately suggested to the most ordinary intelligence and perception or expressly found its existence in the unequal distribution of population in the territories affected. For illustrations of the former category, see: *Maxwell* v. *Dow*, 176 U. S. 581 (1900); *Mallett* v. *North Carolina*, 181 U. S. 589 (1901); *Gardner* v. *Michigan*, 199 U. S. 325 (1905); *Graham* v. *W. Virginia*, 224 U. S. 616 (1912); *Ocampo* v. *United States*, 234, U. S. 91 (1914); *Ohio* v. *Akron Metrop. Pk. Dist.*, 281 U. S. 74 (1930). For illustrations of the second category, see: *Hayes* v. *Missouri*,

120 U. S. 68 (1887); *Morris* v. *Alabama*, 302 U. S. 642 (1937), a per curiam dismissal of an appeal from the highest court of Alabama, whose opinion in 175 So. 283 expressly found reasonableness in the classification based on population differences; *Fort Smith* v. *Board of Improvement*, 274 U. S. 387, 391 (1927); *Jannett* v. *Windham*, 290 U. S. 602 (1933), a per curiam affirmance of an appeal from the highest court of Florida, whose opinion in 147 So. 296, expressly held that in view of the population differences involved "the provisions of the statute are based on a just and reasonable classification with reference to the subject regulated". Cf. dissenting opinion of one of the Florida judges.

The Supreme Court has clearly and expressly recognized that the abstract statement of the power to classify as laid down in *Missouri* v. *Lewis* is subject to the qualification that there must be a reasonable basis for the classification. In addition to the cases cited above, attention is directed to *Atchison, Topeka, etc. Rwy. Co.* v. *Matthews*, 174 U. S. 96, 105, 106 (1899), where the Court expressly cited *Missouri* v. *Lewis* as belonging in that category of cases where the statute in question was sustained because there appeared to be some reasonable basis for the classification. To the same effect is *Truax* v. *Corrigan*, 257 U. S. 312, 336 (1921). In the dissenting opinion of Justice Brandeis in *Louisville Gas Co.* v. *Coleman*, 277 U. S. at 44, footnote 1, *Missouri* v. *Lewis* is expressly catalogued with cases which have sustained classifications based on population differences. In *Holden* v. *Hardy*, 169 U. S. 366, 388, 389 (1898), after quoting from *Missouri* v. *Lewis* to show that each State has the right and power to adopt any system of laws or judicature it sees fit for any part of its territory, the Supreme Court said, at p. 389:

> "We do not wish, however, to be understood as holding that this power is unlimited. • • • the 14th

> Amendment contains a sweeping provision forbidding the states from * * * denying * * * the benefit of due process or equal protection of the laws."

It is thus apparent that the Court of Appeals has misinterpreted the decision in *Missouri* v. *Lewis*. However broad the power of a State to set up territorial classifications with respect to systems of laws or judicature, it is subject to the requirement of reasonableness inherent in the Equal Protection Clause of the 14th Amendment. In the cases cited and referred to above, the practical necessities of judicial administration in dealing with a population unequally distributed over a State was the very basis for sustaining (either expressly or impliedly) statutes setting up a variety of criminal or appellate courts, regulating the right to a jury trial or the State's right to appeal, and specifying the political sub-divisions in which preliminary hearings in criminal cases are or are not allowed, etc. In the case at Bar there are no such considerations to sustain the challenged statute. Population differences are wholly irrelevant and bear no reasonable relation to the subject matter of the challenged statute. Indeed, at the first oral argument of this case in the Court of Appeals of Maryland, Chief Judge Charles Markell (who was retired from the bench after writing the first opinion in this case, 93 A 2d 280, and who was no longer on the bench when the case was reargued) expressly stated that he could not see any possible difference in relation to the subject matter at Bar between Anne Arundel County and those Counties which bordered upon it, such as Calvert and Howard Counties, which might justify different treatment. He pointedly asked the Assistant Attorney General, who argued the case for the State of Maryland—appellee, whether he could suggest any such difference. The Assistant Attorney General frankly admitted that he could not.

2. The closest analogy to the case at Bar is found in two decisions of the New York Appellate Division, First Department. The first is *Krushel* v. *Ladutko*, 11 N. Y. S. 2d 747 (1939), aff'd on other grounds, 281 N. Y. 655. The second is *Commissioner of Public Welfare* v. *Torres*, 31 N. Y. S. 2d 101 (1941). In the *Ladutko* case, the Court had before it a statute which in substance provided that in Paternity Proceedings in New York City, the mother of the "natural child" and her husband shall be permitted to testify to non-access. The common law rule, rendering such evidence inadmissible, applied elsewhere in the State of New York. In holding the statute in violation of the Equal Protection Clause of the 14th Amendment, the Court said, at p. 749:

> "The statute which undertakes to effect a change in the common law rule by allowing such proof within the City of New York while such testimony is still inadmissible in the rest of the State, is based upon no reasonable ground for the distinction it makes. * * * This differentiation within the borders of the State should be based upon reasonable grounds. [Citing cases, including *Missouri v. Lewis*,] The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. * * * Here there appears to be no just or rational basis for the distinction made by the statute in question, and it is * * * unconstitutional."

In the *Torres* case an amendment to the Domestic Relations Law of New York provided in effect that in Paternity Proceedings conducted in New York City testimony of non-access by a person other than the defendant must be corroborated. In other parts of the State, the statute permitted such testimony without corroboration. In striking down this statute the Court rejected population differences

as a basis for sustaining the classification and said, at p. 104:

> "But the discrimination herein cannot reasonably be construed as affecting an evil that exists only in one City of the State and has no existence in all other parts of the State."

The Court of Appeals of Maryland recognized the complete analogy of the decisions in those cases but expressly refused to follow them, saying at p. 284 of 94 A 2d: "We are unwilling to base our decision on that opinion." Instead, the Court, in addition to *Missouri* v. *Lewis*, relied by way of analogy upon *Davis* v. *State*, 68 Ala. 58 (1880); *People* v. *Hanrahan*, 75 Mich. 611 (1889); and *Ohio, ex rel. Lloyd* v. *Dollison*, 194 U. S. 445 (1904). The Court declared that these authorities stand for the general proposition that the equal protection of the laws is not denied by statutes which declare that certain acts are criminal in some counties but not in others (94 A. 2d at 285). An examination of these authorities will disclose that they are not in point and do not support the underlying *ratio decidendi* of the decision of the Court of Appeals of Maryland in the case at Bar, which is that there is no necessity for a finding of reasonableness in a territorial classification which purports to regulate judicial procedure in various parts of the State because the Equal Protection Clause of the 14th Amendment has no application to such regulations. Thus in *Davis* v. *State, supra*, the Alabama Court expressly referred to a reasonable basis for the statute which made it unlawful within certain counties to transport any cotton in the seed after sunset and before sunrise of the succeeding day. The Court said (see p. 63 of 68 Ala.):

> "Its object is to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which in the opinion of the law-making power may

have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits to the public detriment, at least within the specified territory."

People v. *Hanrahan, supra,* did not involve a statute making acts criminal in one County and not in others. The statute in question involved a Home Rule provision of an Illinois Act which granted power to the City of Detroit to prohibit houses of ill fame in that City and to prescribe the penalty for violation of any ordinance passed pursuant thereto. The ordinance passed pursuant to the enabling act was sustained although it prescribed a different penalty than was prescribed by the state-wide law against maintaining houses of ill fame.

Ohio, ex rel. Lloyd v. *Dollison, supra,* involved a local option law regulating the liquor traffic in a certain township. It has long been settled that such laws are in a different category as "the state has absolute power over the subject. It does not abridge that power by adopting the form of reference to a local vote". (See *Rippey* v. *Texas,* 193 U. S. 504, 510.)

3. Aside from the unreasonableness of the primary territorial classification of the challenged statute, the secondary classification whereby "gambling" is selected for discriminatory treatment from the great body of misdemeanors is a clear denial to appellant of the equal protection of the laws. By virtue of the challenged statute, one charged in Anne Arundel County as an operator of a bawdy house or an illegal still or as having conspired with another to commit the most heinous crime (all misdemeanors under the law of Maryland) is protected in the full enjoyment of his constitutional immunities, while a citizen charged with gambling in Anne Arundel County is beyond the pale of this same full protection. With rela-

tion to the subject matter at Bar, it is impossible to conceive any rational difference between particular classes of misdemeanants in Arundel County which would support the discrimination against suspected gamblers. The Court of Appeals of Maryland certainly did not find or even suggest any such difference. Indeed no one would suggest that bootleggers, bawdy house operators and conspirators are easier to catch and convict in Arne Arundel County than gamblers, even if such a consideration could properly be employed to sustain the kind of discrimination involved in the challenged statute.

In *Commissioner of Public Welfare* v. *Koehler*, 30 N.E. 2d 587 (N. Y. 1940) a state-wide statute permitting evidence in Paternity Proceedings of non-access by the husband of the mother of a "natural child" was sustained even though in other types of cases such evidence is excluded by the applicable common law rule. The Court said, at p. 591:

> "It is not unreasonable that in a statutory proceeding to enforce a duty imposed by statute upon the father of a 'natural child' the mother of the child and her husband should be permitted to give testimony which they would not be permitted to give where an adjudication of the status of the child is sought. * * * the foundation of the rule is much firmer when it is invoked for the protection of the child or of the parties to the marriage or of the public, than when invoked as a shield by an alleged adulterer against liability for the consequences which follow from his wrong."

The *Koehler* case clearly demonstrates the necessity for and the kind of rational basis which is required to sustain the application of one rule of evidence to a particular class of cases and a different rule to other cases. In the absence of such a reasonable basis for the discrimination, the rule of evidence would be lacking in that degree of impartiality and uniformity which is essential to its constitutional

validity. See Cooley, Const. Limitations (8th Ed.), vol. 2, pp. 768-769. In the case at Bar there is no reasonable difference between various categories of misdemeanants in Anne Arundel County which would justify the admission of illegally procured evidence against one and its exclusion against all others. All misdemeanants in Anne Arundel County are in the same class. Here, indeed, is the very discrimination "between persons or classes of persons within the municipalities or counties for which such regulations are made" which the Court of Appeals of Maryland, in its lip service to the requirement of "reasonableness", conceded ran counter to the 14th Amendment. 94A 2d at p. 284, *supra*.

4. In an attempt to bolster its decision, the Court of Appeals of Maryland referred in its opinion to the presumption of reasonableness and constitutionality which generally attends a legislative enactment. (94A 2d at p. 284). Aside from any other considerations, such a presumption cannot save a statute, such as the one at Bar, which proposes a classification manifestly and obviously arbitrary and unreasonable on its face. It was expressly so held in *Bailey* v. *Drexel*, 259 U. S. 20, 37, 38. See also 2 Sutherland, Statutory Construction (3rd Ed.) sec. 4509.

In the case at Bar the subject matter of the challenged statute impinges upon one of the most fundamental immunities of the citizen, namely, the right to be secure in one's privacy against arbitrary intrusion by the police. As was said in *Wolfe* v. *Colorado*, 338 U. S., 25, at pp. 27, 28 (1949):

> " * * * It is, therefore, implicit in the 'concept of ordered liberty' and as such, enforceable against the States through the Due Process Clause. * * * Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion

into privacy, it would run counter to the guaranty of the Fourteenth Amendment."

Where the subject matter of a challenged statute deals with one of the fundamental immunities of the citizen it is not entitled to the same presumption of reasonableness and constitutionality which usually attends other types of legislation. *United States* v. *C. I. O.* 335 U. S. 106, 140 (1948); *Ex Parte Mitsuye Endo*, 323 U. S. 283, 299 (1944); *Byars* v. *United States*, 273 U. S. 28, 32 (1927); *Ex Parte Rhodes*, 79 So. 462, 464, 465 (Ala. 1918), quoting Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616; *"The First Ten Amendments"*, by Paul G. Kauper, 37 Amer. Bar Asso. Jr. 717, 718 (1951); *American Jurisprudence, Const. Law*, secs. 59-60. The statute involved in the case at Bar is such a statute, and it can draw no support or vitality from a mere presumption of validity.

5. To further demonstrate the substantiality of the questions involved in this appeal, appellant shows that the trial court, in sustaining the constitutionality of the challenged statute, made the pernicious assumption that under the statute the police of Anne Arundel County no longer have to worry about whether a crime has been committed in their presence because "they would have a *right* to go into the premises on the assumption the amendment of the Bouse Act gave them that *right*". (Italics Supplied) (R. 7). It is true that the Court of Appeals of Maryland in affirming the judgment of the trial Court made no reference to this view of the trial Judge. Nevertheless, the clear effect of the challenged statute, as interpreted and applied, is to incite and encourage the police of Anne Arundel County to ignore the constitutional immunities and to invade the privacy of the citizens of Anne Arundel County at will in cases of suspected gambling. No longer need the police of Anne Arundel County concern themselves with the pro-

curement of a search warrant, for which full and adequate provision is made under the laws of the State of Maryland. (Art. 27, secs. 328, 329, Md. Code, 1951). As thus applied and interpreted the challenged statute, through a sort of "negative direction" contains the kind of "affirmative sanction" to override the constitutional barrier which runs "counter to the guaranty of the Fourteenth Amendment." *Wolfe* v. *Colorado*, 338 U. S. 25, 27, 28 (*supra*).

In conclusion, it is submitted that the Court of Appeals of Maryland has misconstrued and misapplied the decision of the Supreme Court in *Missouri* v. *Lewis* and other relevant and controlling decisions. Appellant believes and earnestly contends that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

HERBERT MYERBERG,
JOSEPH LEITER,
LOUIS M. STRAUSS,
Counsel for Appellant.

APPENDIX A

COURT OF APPEALS OF MARYLAND

No. 49, October Term, 1952—Filed December 12, 1952

JOSEPH JOHN RIZZO, WILLIAM RAYNARD NICHOLSON, JULIUS SALSBURG

vs.

STATE OF MARYLAND

Three Appeals in One Record from the Circuit Court for Anne Arundel County. Benjamin Michaelson, Judge

Argued by Herbert Myerberg, Baltimore, Md., (Joseph Leiter, Baltimore, Md., and Louis M. Straus, Annapolis, Md., on the brief) for appellants.

Argued by Ambrose T. Hartmann, Assistant Attorney-General, (J. Edgar Harvey, Acting Attorney-General, both of Baltimore, Md.; Albert J. Goodman, State's Attorney, Anne Arundel County, and C. Osborne Duvall, Assistant State's Attorney, Anne Arundel County, both of Annapolis, Md., on the brief) for appellee.

Argued before Markell, Chief Judge; Delaplaine, Collins and Henderson, JJ.

Criminal Law—Evidence Seized Without Warrant to Enter Property—Constitutionality of Act Exempting Anne Arundel County From Bouse Act

Police entered premises of Salsburg without a warrant. The Bouse Act, preventing introduction of evidence illegally seized, exempted by Chapter 704, Acts of 1951, Anne Arundel County from its provisions. Objection of Rizzo and Nicholson to the introduction of such evidence was dismissed, as they had claimed no ownership. Salsburg, owner, contended he was denied equal protection of the law.

Held: Re-argument allowed on question of constitutionality of Chapter 704, Acts of 1951.

Judgment affirmed as to Rizzo and Nicholson. Reargument only of constitutional question ordered as to Salsburg.

MARKELL, *C. J.*:

These are appeals from judgments and sentences on conviction of bookmaking. Defendants were arrested on warrants charging bookmaking. Before the magistrate the State's Attorney prayed jury trial. In the circuit court the case was tried without a jury. Code of 1951, Art. 52, sec. 14. *Wilson vs. State*, — Md. —, 88 A. 2d 564.

Before issuance of the warrants for arrest, and without a search warrant or any warrant at all, members of the Anne Arundel County police force, "upon the advice of the State's Attorney", entered by the use of an axe the rear room of a small two-room building in the rear of Roland Terrace Garage, at the intersection of Third Street and Governor Ritchie Highway. There the officers arrested defendants and seized "incriminating evidence" [appellants' brief], the nature of which is not specified in either brief or appendix. There were three telephones there, and three telephone wires leading in. Motions of each defendant that "the articles, items and property enumerated in the return of the police as taken from the premises of your defendant, and all other property of the defendant in custody of the State taken from this defendant * * * be returned to your petitioner" were overruled. Presumably (it does not affirmatively appear) the articles seized were admitted in evidence.

As amended by Chapters 704 and 710 of the Acts of 1951 [approved May 7, 1951, effective June 1, 1951], the Bouse Act (Code of 1951, Art. 35, sec. 5) contains a proviso, "Provided, further, that nothing in this Section shall prohibit the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title." As to Anne Arundel County this proviso was added by Chapter 704, as to Wicomico and Prince George's by Chap-

ter 710. Defendants contend that Chapter 704 denies them the equal protection of the laws and is unconstitutional. The State contends that the act is constitutional, and also that defendants had no title or interest in or to the premises searched and therefore no right to complain of the search and seizure as illegal.

There is no evidence—and no allegation other than any implication in mention of "the premises of your defendant" in the unsworn petitions for return of property seized—that defendant Rizzo and Nicholson had any interest in the premises. Defendants say it is sufficient that they claim the property seized. They cite *United States vs. Jeffers*, 342 U. S. 48, and the often repeated statement of this court that "one cannot complain of an illegal search and seizure of premises *or* property which he neither owns, nor leases, nor controls, nor lawfully occupies, nor rightfully possesses, or in which he has no interest." [Italics supplied.] *Baum vs. State*, 163 Md. 153, 157. Although this statement in the *Baum* case was believed to be supported by many cited state and federal cases, including one Supreme Court case, it appears that recent Supreme Court cases recognize a broader right to complain. *United States vs. Jeffers*, 342 U. S. 48, citing *McDonald vs. United States*, 335 U. S. 451, 456. In the *Jeffers* case narcotics seized without a search warrant in a hotel room of defendant's aunts, in the absence of defendant and his aunts, were ordered suppressed as evidence, though not returned to defendant because they by law were contraband. The decision was not based on the ground that the seizure was illegal, though the search was not (as to the defendant), but on the ground that "the search and seizure" were "incapable of being untied", and therefore were an invasion of the defendant's rights, though he had no interest in the premises. We need not further pursue the *ratio decidendi* in the *Jeffers* case. If it supports defendants' contention in the instant case, it is contrary to the often repeated statement of this court in the *Baum* case.

We are not infrequently reminded by counsel of our statement in *Wood vs. State*, 185 Md. 280, 285, that "The Bouse Act and the Act of 1939 amount to adoption *pro tanto* of the Supreme Court decisions under the Fourth

Amendment." The context shows that the extent of *pro tanto* was the meaning of "illegal search and seizure" as dependent upon want of "probable cause."

In the instant case defendants were convicted on a charge of "making or selling a book or pool on the result of a running race of horses". "Incriminating evidence" to support that charge necessarily showed that defendants were "using and occupying" the building for bookmaking, an offense committed in the officers' presence. Since, therefore, defendants Rizzo and Nicholson could not complain that the search of the premises, in which they had no interest, was illegal, the arrest of them without a warrant and seizure of this evidence was not unlawful as to them.

Defendant Salsburg testified that he rented the premises by an oral lease, at $50 a month, for no definite term, from a named owner, and that he paid the rent to the owner in cash. This testimony was uncorroborated but uncontradicted. It was received by the judge with evident suspicion, but the judge did not say that he did not believe it or that he overruled Salsburg's motion to return on that ground. We cannot hold that the judge (who saw the witness) could not believe Salsburg's testimony and should have overruled his motion on that ground. The fair implication, in the absence of anything to the contrary, is that the motions were overruled because the act was held constitutional and not because Salsburg had no right to raise the question. *Cf. Lambert vs. State*, — Md. —, 75 A. 2d 327, 328.

In *Sugarman vs. State*, 173 Md. 52, 57-58, we held that a motion, before trial, to declare a search warrant null and void and to suppress use of the articles seized as evidence and compel return of them was "founded upon no statute of this State", nor "supported by precedent to justify its propriety." In *Smith vs. State*, 191 Md. 329, 334, and in *Asner vs. State*, 193 Md. 68, 73, 65 A. 2d 881, 883, we noted that such a motion to quash a search warrant is now authorized by statute. Code of 1951, Art. 27, sec. 328. In the instant cases the motions made are not authorized by statute, but are closely analogous to motions to quash. Rule 3(1) of the Criminal Rules of Practice and Procedure provides that, "Any defense or objection which is capable of determination without the trial of the general issue may be

raised before trial by motion." Rule 3(4) provides that, "A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue." In the instant cases the court did dispose before trial of the questions thus raised. This rule includes the motions in the instant cases.

The question of the constitutionality of Chapter 704 is therefore presented for decision in Salsburg's case. We have decided to order a reargument on this constitutional question alone in Salsburg's case. For the reasons already stated, the judgment will be affirmed as to Rizzo and Nicholson.

Judgment affirmed with costs as to Rizzo and Nicholson. Reargument of constitutional question only ordered as to Salsburg.

COURT OF APPEALS OF MARYLAND

No. 49, October Term, 1952—Filed February 5, 1953.

JULIUS SALSBURG

vs.

STATE OF MARYLAND

Appeal from the Circuit Court for Anne Arundel County, Benjamin Michaelson, Judge.

Reargued by Herbert Myerberg, Baltimore, Md., (Joseph Leiter, Baltimore, Md., and Louis M. Strauss, Annapolis, Md., on the brief) for appellant.

Reargued by Ambrose T. Hartman, Assistant Attorney-General, Baltimore, Md., (Edward D. E. Rollins, Attorney-General, Baltimore, Md.; Albert J. Goodman, State's Attorney, Anne Arundel County; and C. Osborne Duvall, Assistant State's Attorney, Anne Arundel County, both of Annapolis, Md., on the brief) for appellee.

Argued before SOBELOFF, Chief Judge; DELAPLAINE, COLLINS and HENDERSON, JJ.

Constitutional Law—Fourteenth Amendment—Equal Protection of the Law Clause—Amendment to Bouse Act—Bookmaking

Amendment to Bouse Act, which makes inadmissible in misdemeanor cases evidence illegally seized, excepted Anne Arundel County from the provisions of the Act. The appellant alleged this amendment was unconstitutional as denying him equal protection of the law as provided by the Fourteenth Amendment to the Federal Constitution.

Held: The statute does no more than change a rule of evidence and the State has the right to control the procedure in its courts. This did not deny appellant equal protection of the law.

Judgment affirmed.

DELAPLAINE, J.—Julius Salsburg, who was convicted by the Circuit Court for Anne Arundel County of bookmaking on horse races, is challenging here the constitutionality of Chapter 704 of the Laws of 1951, which amends the statutory rule of evidence known as the Bouse Act, Laws 1929, ch. 194, by adding a proviso that the Act shall not prohibit the admission of illegally procured evidence in Anne Arundel County in prosecutions for violations of the State gambling laws.

The Act was also amended by Chapter 710 of the Laws of 1951, which provides that the Act shall not prohibit the admission of such evidence in Wicomico and Prince George's Counties. Thus the Act, as codified in Code 1951, art. 35, sec. 5, provides as follows:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State * * *. Provided, further, that nothing in this section shall prohibit the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title

'Gaming', or in any laws amending or supplementing said sub-title."

Salsburg and two other men, Joseph John Rizzo and William Raynard Nicholson, were arrested by five officers of the Anne Arundel County Police Department on May 21, 1952, in a two-room building in the rear of a garage along the Governor Ritchie Highway at Brooklyn. When the police officers appeared on the scene, the front door was open but the door to the rear room was locked. They rapped on the door to the rear room, but, as no one answered, they broke the door open with an ax. Upon entering the room they arrested defendants and seized three telephones, two adding machines, racing forms and other paraphernalia. While the officers were in the building many telephone calls came from persons wanting to make bets.

Before the trial defendants filed motions to suppress the evidence and dismiss the proceedings. It was conceded that the police officers raided the building without a search warrant and that they seized the gambling paraphernalia illegally. Defendants contended that the 1951 amendment of the Bouse Act violates the Fourteenth Amendment of the Constitution of the United States, and that the paraphernalia were inadmissible under the Bouse Act as it stood before the amendment. The Court overruled the motions and admitted the paraphernalia in evidence. The Court thereupon found each defendant guilty and sentenced each to the Maryland House of Correction for six months and to pay a fine of $1,000.

On December 12, 1952, the Court of Appeals held, in an opinion by Chief Judge Markell, that Rizzo and Nicholson could not complain of the illegality of the search and seizure, because they had no interest in the raided premises. Salsburg, on the other hand, testified that he was lessee of the building at the time of the raid. Therefore, the paraphernalia would be admissible as to him only in case the 1951 statute is valid. We ordered a reargument of his appeal on the question of the constitutionality of the statute. Rizzo vs. State, Md., 93 A. 2d 280.

Prior to the enactment of the Bouse Act in 1929, this Court held that where evidence offered in a criminal trial

is otherwise admissible, it will not be rejected because it was obtained illegally. Meisinger vs. State, 155 Md. 195, 141 A. 536, 142 A. 190; Heyward vs. State, 161 Md. 685, 158 A. 897; Baum vs. State, 163 Md. 153, 161 A. 244. This is still the rule in prosecutions for felonies in this State. Marshall vs. State, 182 Md. 379, 35 A. 2d 115; Delnegro vs. State, Md., 81 A. 2d 241, 244. The Bouse Act changed the rule only in trials for misdemeanors.

We find no reason to hold that the 1951 statute, making illegally procured evidence admissible in certain trials in Anne Arundel County, is in conflict with the Fourteenth Amendment of the Federal Constitution or Article 23 of the Maryland Declaration of Rights. It is true that in Weeks vs. United States (1914), 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, the United States Supreme Court held that evidence obtained in violation of the Fourteenth Amendment is inadmissible in the Federal courts. But in Wolf vs. People of State of Colorado (1949), 338 U. S. 25, 69 S. Ct. 1359, 1361, 93 L. Ed. 1782, the Court explicitly stated that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

In explanation of the rule, Justice Frankfurter made the following comment: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. * * * Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."

Appellant vigorously protested that the statute, partially exempting Anne Arundel County from the operation of the Bouse Act, will tend to give encouragement to the county

police to violate the law by invading private homes to make searches and seizures without a warrant. A similar protest was made by the defendant in People vs. Defore (1926), 242 N. Y. 13, 150 N. E. 585, 588, 589, but the Court of Appeals of New York announced that it preferred the State rule to the Federal rule. In that case Judge Cardozo said in the opinion of the Court: "We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crime the most flagitious. * * * We do not know whether the public, represented by its juries, is today more indifferent to its liberties than it was when the immunity was born. If so, the change of sentiment without more does not work a change of remedy. Other sanctions, penal and disciplinary, supplementing the right to damages, have already been enumerated. No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaled if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice."

We now pass to the important question whether appellant was denied the equal protection of the laws when the Circuit Court for Anne Arundel County, in accordance with the 1951 statute, admitted illegally procured evidence against him at his trial for gambling, while the law makes illegally procured evidence inadmissible in trials for the same offense in twenty counties and the City of Baltimore.

Ever since the beginning of our Government, American political philosophy has been based upon principles of equality. Protection from unequal operation of the laws entitling a person to like privileges and burdens accorded to other persons in like circumstances is a basic American concept. It was thus natural that this concept was ex-

pressed in the guaranty of protection from arbitrary and unjust disparity of treatment contained in Federal and State Constitutions. The constitutional guaranty of equality is construed, however, to give full play to the powers of government so long as the exercise of those powers is clearly not an infringement of the rights of citizens.'

The principal guaranty of equality in American Constitutions is the clause in the Fourteenth Amendment to the Federal Constitution which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This amendment was proclaimed to be in force July 28, 1868. It was nearly five years afterwards when the Supreme Court construed the Amendment in the Slaughter-House Cases (1873), 16 Wall. 36, 81, 21 L. Ed. 394, 410. The Amendment had been submitted to the people to give protection to the Negroes, who had been recently emancipated, but those cases raised questions of the extent of the police power of the State and the granting of a monopoly. The Legislature of Louisiana had granted a monopoly of the slaughter-house business in New Orleans in favor of one corporation, thereby depriving many citizens of the right to engage in that business. The Court held that the statute did not violate any provision of the Fourteenth Amendment and that the subject of local monopoly was for the States, not for the Federal Government, to deal with. In referring to the Equal Protection Clause, Justice Miller said in the opinion of the Court: "The existence of laws in the States where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. * * * We doubt very much whether any action of a state not directed by way of discriminaton against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

That prophecy proved to be false. The majority of the litigants who have invoked the Equal Protection Clause have charged discrimination in economic legislation, rather than race discrimination. It is now universally recognized that the Equal Protection Clause guarantees that equal

protection shall be given to all persons under like circumstances in the enjoyment of their civil and personal rights; that all persons are equally entitled to acquire and enjoy property; that they shall have like access to the courts of the country; that no impediment shall be interposed to the pursuits of any person except as applied to the same pursuits by others under like circumstances; and that no greater burdens shall be laid upon one than are laid upon others in the same calling and condition. Barbier vs. Connolly, 113 U. S. 27, 5 S. St. 357, 28 L. Ed. 923.

It has been held that the power of the Legislature to regulate a business or occupation cannot be exercised arbitrarily or in such a manner as to deprive a citizen of rights, privileges, or property to which he is entitled as a matter of natural justice, except for the protection of some substantial public interest; nor can such power be exercised in such a manner as to impose upon members of a selected class burdens which are not shared by others in like circumstances. In so far as a statute grants privileges to or places burdens upon an individual, or limits his rights, especially his right to engage in a particular business or occupation, a statute may be invalidated by an arbitrary or unreasonable classification or discrimination in respect to territory. Herbert vs. County Com'rs of Baltimore County, 97 Md. 639, 644, 55 A. 376; Watson vs. State, 105 Md. 650, 655, 66 A. 635; Clark vs. Harford Agricultural & Breeders' Ass'n, 118 Md. 608, 620, 85 A. 503; Criswell vs. State, 126 Md. 103, 109, 94 A. 549. The classification must be reasonable and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, and the law shall apply equally to all persons similarly situated within the territory described in the act. Ocampo vs. United States, 234 U. S. 91, 34 S. Ct. 712, 715, 58 L. Ed. 1231; Royster Guano Co. vs. Commonwealth of Virginia, 253 U. S. 412, 40 S. Ct. 560, 64 L. Ed. 989; Ft. Smith Light & Traction Co. vs. Board of Improvement, 274 U. S. 387, 47 S. Ct. 595, 597, 71 L. Ed. 1112. The classification is presumed to be reasonable in the absence of clear and convincing indications to the contrary, and the person attacking the classification has the burden of

showing that it does not rest upon any reasonable basis but is essentially arbitrary. Lindsley vs. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369.

In State vs. Shapiro, 131 Md. 168, 173, 101 A. 703, it was held by this Court that a statute requiring different rates of license fees for the privilege of dealing in junk, according to the population of the county or city in which the business is conducted, does not deny any person the equal protection of the laws. On the contrary, in Dasch vs. Jackson, 170 Md. 251, 269, 183 A. 534, the Court held that a statute providing for the licensing and regulation of paperhangers in the City of Baltimore denied equal protection of the laws, because it had no substantial relation to the public health or safety and there was no rational basis for the territorial classification. Likewise, we held that the Strip Mining Act, Laws 1947, Sp. Sess., ch. 16, which discriminated between operators of coal mines in Garrett County and those in Allegany County, was unconstitutional, because there was no difference in the conditions in the two counties that would make strip mining a menace to public health and safety in Allegany but harmless in Garrett, and there was no rational basis for the territorial classification and no justification for the discrimination. Maryland Coal & Realty Co. vs. Bureau of Mines of State, 193 Md. 627, 69 A. 2d 471.

These principles have been recognized in cases dealing with statutes imposing licenses, taxes and other burdens in the exercise of the police power of the State. But those statutes are quite different from the statute now before us. This statute does no more than prescribe a rule of evidence.

It is true that one of the intermediate courts in New York has held that where a statute dealing with bastardy proceedings in all parts of the State outside of the City of New York permitted testimony of the defendant as to access by others without corroboration, another statute requiring corroboration of such testimony in proceedings brought in the City of New York was unconstitutional. Commissioner of Public Welfare vs. Torres, 263 App. Div. 19, 31 N. Y. S. 2d 101. We are unwilling to base our decision on that opinion. The Equal Protection Clause contemplates the

protection of persons or classes of persons against unjust discrimination by the State, but it has no reference to municipal or territorial arrangements made for different portions of the State that do not injuriously affect or discriminate between persons or classes of persons within the municipalities or counties for which such regulations are made. The State can establish any system of laws it sees fit for all or any part of its territory, provided that it does not encroach on the jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, or deprive any person of due process of law or equal protection of the laws. Thus it has been held that the Legislature has the power to declare that certain acts are criminal in some counties but not in others. Davis vs. State, 68 Ala. 58, 44 Am. Rep. 128, 132; People vs. Hanrahan, 75 Mich. 611, 42 N. W. 1124. For instance, the equal protection of the laws is not denied by a State local option law under which the traffic in intoxicating liquors may be made a crime in certain territory and permitted elsewhere. State of Ohio ex rel. Lloyd vs. Dollison, 194 U. S. 445, 24 S. Ct. 703, 48 L. Ed. 1062.

In emphasizing the right of the State to establish its own system of laws, Justice Bradley said in State of Missouri vs. Lewis (1880), 101 U. S. 22, 25 L. Ed. 989, 992: "If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. * * * If diversi-

ties of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

It has always been the policy of the State of Maryland to permit the enactment of local laws affecting only one county or the exemption of particular counties from the operation of general laws or some provisions thereof. Stevens vs. State, 89 Md. 669, 674, 43 A. 929, 931; Neuenschwander vs. Washington Suburban Sanitary Commission, 187 Md. 67, 48 A. 2d 593, 600. Moreover, the right of a citizen to have his controversies determined by existing rules of evidence is not a vested right. Rules of evidence relate to the remedies which the State provides for its citizens, and, like other rules affecting the remedy, they are subject at all times to modification by the Legislature. Mobile, Jackson, & Kansas City R Co. vs. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78; Luria vs. United States, 231 U. S. 9, 34 S. Ct. 10, 58 L. Ed. 101. Rules of evidence are not a constituent part of any contract and are not of the essence of any right which a party may seek to enforce. Generally speaking, therefore, the State, having the right to control procedure in its courts, has the power to regulate the admissibility of evidence without denial of equal protection of the laws. Illinois Central R. Co. vs. Paducah Brewery Co., 157 Ky. 357, 163 S. W. 239, 242. We, therefore, conclude that the statute assailed by appellant does not violate the Equal Protection Clause.

For these reasons we hold that the paraphernalia, although procured by illegal search and seizure, were admissible. As we find no error in the ruling of the trial Court, the judgment of conviction will be affirmed.

Judgment affirmed, with costs.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 712 38

JULIUS SALSBURG,

Appellant,

vs.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE APPELLANT

HERBERT MYERBERG,
JOSEPH LEITER,
LOUIS M. STRAUSS,
Counsel for Appellant.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

Table of Cases Cited

Statutes Cited

Miscellaneous Citations

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 712

JULIUS SALSBURG,

Appellant,

vs.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The first opinion of the Court of Appeals of Maryland, which decided that the constitutionality of the challenged statute was squarely presented for decision in the case of this Appellant, is reported in 93 A. 2d 280. The second opinion of the Court of Appeals of Maryland, which decided in favor of the validity of the challenged statute is reported in 94 A. 2d 280. Both of said opinions are printed in the Record (R. 15, 18).

JURISDICTION

The final judgment of the Court of Appeals of Maryland sought to be reviewed was entered on February 5, 1953 (R. 27). The application for appeal to the Supreme Court was presented on March 26, 1953. On May 18, 1953, the Supreme Court noted "probable jurisdiction" and placed the case on the Summary Docket for argument (R. 33).

In this case there was drawn in question the validity of a statute of the State of Maryland, hereinafter set forth, on the ground of its being repugnant to Section 1 of the 14th Amendment of the Constitution of the United States. The Appellant was on trial in the Circuit Court for Anne Arundel County charged with committing a misdemeanor by violating the gambling laws of the State of Maryland which prohibit the making of book on the result of horse races. The admissibility of the evidence upon which Appellant was ultimately convicted depended upon the constitutional validity of the challenged statute, and the decision and judgment of the Court of Appeals of Maryland (being the highest court in the State) were in favor of its validity. The jurisdiction of the Supreme Court to review this decision and judgment by appeal is conferred by Title 28, United States Code, Section 344(a) (28 U. S. C. A., 1257(2)). The following decisions sustain the jurisdiction of the Supreme Court to review the decision and judgment on appeal in this case: *Ward v. Maryland*, 12 Wall. 418, 423, 424 (1871); *Home Insurance Co. v. Augusta, Ga.*, 93 U. S. 116, 121 (1876); *Foster v. Kansas*, 112 U. S. 201, 205, 206 (1884); *Cissna v. Tennessee*, 246 U. S. 289, 293, 294 (1918); *Chicago, R. I. & P. R. Co. v. Perry*, 259 U. S. 548, 551, 552 (1922); *New York v. Zimmerman*, 278 U. S. 63, 67-69 (1928); *Charleston Fed. Sav. & L. Assoc. v. Alderson*, 324 U. S. 182, 185-186 (1945); *Illinois v. Board of Education*, 333 U. S. 203, 206 (1948); *Kedroff v. St. Nicholas Cathedral*, 97 L. Ed. (Advance) 95, 98 (1952).

QUESTIONS PRESENTED

1. Is it a violation of the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States for the Legislature of Maryland to amend a statute of state-wide application, which renders inadmis-

sible in the trial of a misdemeanor any evidence procured as a result of an illegal search and seizure, by providing that such evidence shall be admissible in such a trial in a single county of the State, where no reasonable ground of difference exists between conditions in the territory selected for exemption and conditions elsewhere in the State?

2. Was the Appellant denied the Equal Protection of the Laws under Section 1 of the 14th Amendment to the Constitution of the United States by the admission in evidence against him at his trial for a misdemeanor in the Circuit Court for Anne Arundel County (in accordance with the exemption contained in the amendatory statute now being challenged) of illegally procured evidence, notwithstanding the law renders illegally procured evidence inadmissible in trials for the same offense elsewhere in the State of Maryland?

3. Was the Appellant denied the Equal Protection of the Laws under Section 1 of the 14th Amendment to the Constitution of the United States by the admission in evidence against him at his trial for the misdemeanor of "gambling" in Anne Arundel County (in accordance with the exemption contained in the challenged statute) of illegally procured evidence notwithstanding the law renders illegally procured evidence inadmissible in trials for all other misdemeanors in the same County and in trials for the same offense of "gambling" where the prosecution is under the local gambling laws of said County?

4. Was the Appellant denied the Equal Protection of the Laws under Section 1 of the 14th Amendment to the Constitution of the United States by the admission in evidence against him at his trial in Anne Arundel County for the misdemeanor of making book on the result of horse races (in accordance with the exemption contained in the chal-

lenged statute) of illegally procured evidence notwithstanding the law renders illegally procured evidence inadmissible in trials for the misdemeanor of conducting a lottery in the same County?

5. Does the Equal Protection Clause of Section 1 of the 14th Amendment of the Constitution of the United States apply so as to prohibit a State from making territorial classifications for the administration of justice and judicial procedure for different portions of the State, which said classifications are arbitrary, do not rest upon some reasonable ground of difference between conditions in the territory selected and conditions elsewhere in the State and do not bear a fair and substantial relation to the object of the legislation?

6. Does the subject matter of the challenged statute impinge upon a fundamental right implicit in the concept of ordered liberty so that it is not entitled to the same presumption of reasonableness and constitutionality which usually attends other types of legislation?

7. All the points raised in the Assignment of Errors are also presented. The Questions Presented as stated above set forth the major issues.

STATUTE INVOLVED

The Maryland statute involved, the validity of which was sustained by the Court of Appeals of Maryland, is Acts of 1951, Chapter 704, which, as further amended by Acts of 1951, Chapter 710, is codified as Article 35, Section 5, Code of Public General Laws of Maryland, 1951 edition. The pertinent provisions of said statute are as follows:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal

search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case; * * *. Provided, further that nothing in this section shall prohibit the use of such evidence in Anne Arundel, *Wicomico and Prince George's* Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title." (Italics supplied.)

The words italicized, which brought Wicomico and Prince George's Counties within the exemption of the proviso, were added by Acts 1951, Chapter 710. The proviso itself was originally enacted by the challenged statute (Acts 1951, Chapter 704) as an amendment to the then existing law, and, as so enacted, it applied only to Anne Arundel County. As thus finally amended by the two acts of 1951, 20 of the 23 Counties of the State and Baltimore City, which is an autonomous municipality not within any County, are not affected by the proviso so that illegally procured evidence remains inadmissible in the trial of gambling cases in those jurisdictions.

It is important to note that the exempting proviso applies only in prosecutions "for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27", which is a reference to the state-wide gambling laws. Anne Arundel County has a local gambling statute (Art. 2, secs. 292, 293, Code of Public Local Laws of Maryland, 1930) which is not included in the proviso. Thus in prosecutions in Anne Arundel County for a violation of the local gam-

bling statute, illegally procured evidence remains inadmissible.

It is of further importance to observe that the aforementioned sections 303-329 do not include the state-wide lottery laws which are contained in sections 423-438, 642-651, of Article 27, Maryland Code, 1951. Thus in Anne Arundel County illegally procured evidence is admissible against persons who indulge in the forms of gambling proscribed by sections 303-329,[1] but it remains inadmissible against persons who engage in a prohibited lottery.

---

[1] The following is a brief abstract of the forms of gambling prohibited under Art. 27, secs. 303-329, Md. Code, 1951:

Sec. 303. Prohibits the keeping of a gaming table, house, etc., for the purpose of gambling.

Sec. 304. Defines gaming table.

Sec. 305. Prohibits the leasing of a house, etc., for gambling.

Sec. 306. Prohibits betting and making book on the result of horse races.

Sec. 307. Exempts betting and book making on horse races conducted within the grounds of a licensed agricultural association.

Secs. 308-310. Licensing regulations under section 307.

Sec. 311. Prescribes the penalty for keeping a gaming table.

Sec. 312. Prescribes the penalty for owners and tenants of property who permit keeping of a gaming table.

Sec. 313. Authorizes recovery in action at law of money lost at a gaming table.

Sec. 314. Further definition of gaming table.

Sec. 315. Prescribes the penalty for playing "Thimbles", "Little Joker" and "Craps."

Sec. 316. Provides for liberal construction of preceding sections.

Secs. 317-319. Exempts bingo games conducted for charity in certain counties.

Secs. 320-323. Exempts raffles, etc. held by certain patriotic, religious and charitable organizations in certain counties.

Secs. 324-325. Exempts bingo games in Washington County and Baltimore City where prize is limited.

Sec. 326. Self-incrimination no ground for refusal to testify in connection with prosecution under preceding sections, but grants witness immunity from prosecution.

Sec. 327. Requires police to visit suspected places and enforce the law.

Secs. 328-329. Search warrant law.

STATEMENT OF THE CASE

The Appellant was convicted by the Circuit Court of Anne Arundel County of committing a misdemeanor by violating the gambling laws of the State of Maryland which prohibit the making of book on the result of horse races. The evidence upon which he was convicted was admittedly procured as a result of an illegal search and seizure by the police of Anne Arundel County, and its admissibility was dependent upon the constitutional validity of the challenged statute.

Prior to the trial on the merits, Appellant filed a motion to suppress the evidence. The testimony taken in support of the motion disclosed that on the afternoon of May 21, 1952, Captain Wilbur C. Wade, of the Anne Arundel County Police force, in company with other officers, approached a small one room building in the rear of a certain garage situated on the Governor Ritchie Highway, Anne Arundel County, Maryland. It was stipulated that no search warrant had been issued for the invasion of these premises. The door to the premises was locked. Captain Wade admitted that he could not see into the premises because the window was painted, and that he could not hear any sounds coming from the room. All that the officers saw were some telephone wires leading into the premises. They tried to get someone to come to the door and open it, but no one answered. The police then forced the door open with an axe. The Appellant was found in the room. A search of the room revealed incriminating evidence which was seized by the police. Captain Wade made no pretense at justifying his forceable entry into the premises on the basis of any preliminary sensory discovery indicating commission of a crime. He frankly admitted that he broke into the room solely "upon the advice of the State's Attorney" (R. 7, 8).

The trial Court in stating the problem before it said that if the challenged statute were valid the police "would have *a right to go into the premises* on the assumption the Amendment of the Bouse Act *gave them that right.*" (Italics supplied) (R. 5). Thereafter the trial Court overruled the motion to suppress the evidence, impliedly holding that the challenged statute was constitutional. (See 93 A. 2d at p. 282, where the Court of Appeals of Maryland said: "The fair implication * * * is that the motions were overruled because the act was held constitutional * * *.")

At the trial on the merits the timely objections of Appellant to the introduction of the evidence were overruled. The trial Court, sitting without a jury, found Appellant guilty as charged and sentenced him to six months in the Maryland House of Correction and to pay a fine of one thousand dollars and costs.

The Appellant had been tried jointly with two other defendants (Joseph John Rizzo and Wm. Raymond Nicholson), who were also convicted and who received the same sentence, and all three defendants perfected an appeal to the Court of Appeals of Maryland. In the first opinion of the Court of Appeals of Maryland (93 A. 2d 280), the judgment and sentence of the trial Court was affirmed as to the other two defendants because it was held that they had no interest in the premises searched and therefore had no status to object to the illegal search and seizure. The Appellant, Julius Salsburg, however, was found to have a proper interest in the premises and the constitutional question only was ordered reargued as to him. Following the reargument, the Court of Appeals of Maryland held the challenged statute valid and affirmed the judgment and sentence as to the present Appellant, Julius Salsburg. The present appeal, therefore, is solely on behalf of Julius Salsburg.

SPECIFICATION OF ERRORS

The errors intended to be urged are the same as appear in the Assignment of Errors printed in the Record (R. 28-31).

SUMMARY OF ARGUMENT

The challenged statute (Chapter 704, Acts 1951) involves a triple classification. The first or primary classification is territorial in its effect by exempting one County of the State from the state-wide statutory rule of exclusion of illegally procured evidence in misdemeanor cases. The secondary classification selects for discrimination violations of the state-wide "Gaming" laws, (a misdemeanor), leaving all other misdemeanors committed within the one County in question subject to the state-wide rule of exclusion. The third classification selects for discrimination persons charged with violating the state-wide gambling laws, leaving persons charged with violating the local gambling laws in the one County in question free to enjoy the statutory rule of exclusion. Also inherent in this third classification is the discrimination against persons who indulge in certain specified forms of gambling, leaving violators of the state-wide lottery laws free to enjoy the statutory rule of exclusion. All three of the classifications are purely arbitrary. The primary classification is not supported by any reasonable difference between conditions in the territory selected for discrimination and elsewhere in the State. The secondary classification is not supported by any rational difference between particular classes of misdemeanants in Anne Arundel County which would support the discrimination against suspected gamblers. The third classification is not supported by any rational difference between violators of the state-wide gambling laws and violators of the similar local law nor between book-makers and lottery operators. None

of the classifications bears any reasonable or valid relation to the object sought to be accomplished by the challenged statute, which, as the State concedes, is none other than to facilitate the apprehension and conviction of suspected gamblers in Anne Arundel County. Here the relation to the object sought to be accomplished is patently grounded upon the pernicious assumption that the challenged statute confers the "right" and "direction" to search and seize in violation of the citizen's constitutional immunity. Under the doctrine of *Wolfe v. Colorado*, 338 U. S. 25 (1949), this assumption involves a denial of Due Process. The means to the otherwise justifiable end is thus illegal, and it cannot be considered just or reasonable for the purpose of supporting the classification. The State, however, argues that the challenged statute contains no affirmative sanction to invade the constitutional immunity against illegal search and seizure and that it was not intended as a direction to the police to search and seize without regard to the constitutional rights of the citizen. If the correctness of this contention be assumed, it then becomes evident with piercing clearness that the challenged statute and the classifications it makes are utterly pointless and without any imaginable relation to the legislative objective of facilitating the apprehension and conviction of suspected gamblers in Anne Arundel County. Especially is this so in view of the fact that violators of the local gambling laws in Anne Arundel County and violators of the state-wide lottery laws remain secure in the full enjoyment of their constitutional immunity against unreasonable search and seizure.

The Court of Appeals of Maryland made no attempt to find even a debatable rational basis to support the discrimination inherent in the challenged statute. It took the view that the statute did no more than prescribe a rule of evidence which fell in the category of territorial arrangements

for the administration of justice and judicial procedure in different portions of the State. On the authority of *Missouri v. Lewis*, 101 U. S. 22 (1880), the Court of Appeals in effect concluded that the Equal Protection Clause did not apply to such arrangements and that the classifications involved were not subject to the otherwise basic requirements that class legislation must not be arbitrary, must be founded upon a reasonable ground of difference and must bear a reasonable and valid relation to the object sought to be accomplished by the statute. This is a clear distortion and misinterpretation of the doctrine established by *Missouri v. Lewis*. That case, as well as the numerous decisions of the Supreme Court and of State courts which have quoted and relied upon it, firmly establish that the basic requirements of "a reasonable ground of difference" and "a reasonable relation to the object sought to be accomplished" apply equally in *every* case of classification, whether the subject matter of the legislation involves taxation, licensing, economic activities or judicial administration and procedure. Rules of evidence are not immune from applicable constitutional limitations, and this Court has expressly so held. *Mobile, etc. R. R. v. Turnipseed*, 219 U.S. 35, 43 (1910).

Illustrative of the Appellant's contention are two decisions closely analogous to the case at Bar of an intermediate appellate court of New York which, relying on *Missouri v. Lewis*, invalidated a discriminatory rule of evidence prescribed by statute because there was no reasonable ground of difference between the territory selected and the territory excluded. *Krushel v. Ladutko*, 11 N. Y. S. 2d 717 (1939); *Commissioner of Public Welfare v. Torres*, 31 N. Y. S. 2d 101 (1941).

The presumption of reasonableness and constitutionality which generally attends a legislative enactment cannot

save the challenged statute because the classifications it proposes are manifestly and obviously arbitrary and unreasonable on their face. In addition, the subject matter of the statute impinges upon one of the most fundamental immunities of the citizen, and it is settled by the decisions of this Court that a presumption of validity does not apply to such a statute.

ARGUMENT

I.

Legislative History of the Challenged Statute

Prior to the enactment of Chapter 194, Acts of 1929 (now codified, as subsequently amended, in Art. 35, Sec. 5, Md. Code, 1951) the Maryland Court of Appeals rejected the federal rule of exclusion of illegally procured evidence, and such evidence was admitted in criminal trials involving all categories of crime. *Meisinger v. State*, 155 Md. 195 (1928). As a result of this decision, the Legislature enacted Chapter 194 of the Acts of 1929, popularly known as the Bouse Act. This statute, which was state-wide in its application, rendered such evidence inadmissible in the trial of all misdemeanors, thus partially adopting the federal rule of exclusion. As to prosecutions for felonies the old rule of admissibility remained the same and is still in force. *Marshall v. State*, 182 Md. 379 (1943); *Delnegro v. State*, 81 A. 2d 241 (Md. 1951). Thus Maryland adopted a hybrid position on the important question of how best to secure to the citizen his fundamental right of security against arbitrary intrusion upon his privacy by the police.

Following the enactment of the Bouse Act, the Court of Appeals of Maryland characterized it by saying that it "fairly summed up" the immunities guaranteed by Articles 22 and 26 of the Maryland Declaration of Rights, which

are in *pari materia* with the 4th and 5th Amendments to the Constitution of the United States. *Bass v. State*, 182 Md. 496, 500 (1943). Somewhat earlier, the same Court warned that "An examination of the statute books of the Federal Government and the states demonstrates the necessity for these constitutional barriers because they indicate a ceaseless steady pressure on the part of government to lessen the difficulty of convicting persons charged with crime by encroaching on these immunities". *Miller v. State*, 174 Md. 362, 370 (1938). The "ceaseless pressure" alluded to was successfully resisted in Maryland for almost 20 years after the enactment of the Bouse Act. However, in 1947 a small hole was made in the partial dike erected by the Bouse Act when the Baltimore County Delegation in the Maryland Legislature succeeded in securing the enactment of Chapter 752 of the Acts of 1947, which amended the Bouse Act so that — "nothing in this section shall prohibit the use of such evidence in Baltimore County in the prosecution of any person for unlawfully carrying a concealed weapon". At the 1951 session of the Legislature, other local delegations succeeded in enlarging the breach by securing the enactment of Chapter 145 of the Acts of 1951, whereby Baltimore City and thirteen counties joined Baltimore County in the exemption of concealed weapons cases. At the same session, the Anne Arundel County delegation secured the passage of the amendatory statute now being challenged (Ch. 704, Acts 1951) and the Wicomico and Prince George's Counties delegations joined Anne Arundel County by securing the passage of Chapter 710 of the Acts of 1951. At the 1952 session of the Maryland Legislature, Chapter 59 of the Acts of 1952 was enacted whereby a new section was added to the law, making the exemption from the Bouse Act of concealed weapons cases state-wide in its application (Art. 35, Sec. 5A, Md. Code,

1951).[2] There are no recorded legislative debates pertaining to Chapter 59 of the Acts of 1952 disclosing the considerations which prompted its passage. However, it is a fair statement to say that its purpose was to make the "concealed weapons" exemption from the Bouse Act state-wide in its application in order to eliminate any question of a violation of the Equal Protection Clause of the 14th Amendment of the Constitution of the United States. The point had never been formally raised and adjudicated, but many leading members of the Maryland Bar had often expressed serious doubts on the point. (For a similar legislative procedure, making a special rule of evidence in paternity cases state-wide in its application after a statute confining its operation to New York City had been declared unconstitutional by an intermediate appellate court, see *Commissioner of Public Welfare v. Koehler*, 30 N. E. 2d 587, 590 (N. Y. 1940), referring to *Krushel v. Ladutko*, 11 N. Y. S. 2d 747, 749.)

---

[2] At the 1953 session of the Maryland Legislature, (Chs. 84, 419, 581) Howard, Cecil and Worcester Counties joined Anne Arundel, Wicomico and Prince George's Counties in the exemption from the otherwise state-wide rule of exclusion of illegally procured evidence in gambling cases, and Wicomico County was given an exemption in prosecutions for violations of the alcoholic beverage laws. These amendments do not apply to or affect the case at Bar. They are referred to here primarily for the purpose of bringing the legislative history of the basic Bouse Act up to date. It may also serve to demonstrate the wholly irrational, haphazard and piecemeal manner in which the Legislature has dealt with one of the most basic and fundamental rights of the citizen.

II.

The Triple Classification Established by the Challenged Statute is Arbitrary and Unreasonable on its Face. It is not Supported by the Basic Requirements of all Class Legislation That There be "A Reasonable Ground of Difference" and "A Reasonable Relation to the Object Sought to be Accomplished".

In the case at Bar, the only statute before the Court is Chapter 704 of the Acts of 1951 which involves a triple classification. The first or primary classification is territorial in its effect by exempting one County of the State from the state-wide statutory rule of exclusion of illegally procured evidence. The secondary classification selects for discrimination violations of the state-wide "Gaming" laws, leaving all other misdemeanors committed within the one County in question subject to the state-wide rule of exclusion. The third classification selects for discrimination persons charged with violating the state-wide gambling laws, leaving persons charged with violating the local gambling laws in the one County in question free to enjoy the statutory rule of exclusion. In addition, this third classification selects for discrimination persons who indulge in certain specified forms of gambling, leaving violators of the state-wide lottery laws free to enjoy the statutory rule of exclusion.

The State has argued that the challenged statute does no more than reinstate the former judicial rule of evidence which held illegally procured evidence admissible and which this Court in *Wolfe v. Colorado*, 338 U. S. 25 (1949) held did not in itself violate the Due Process Clause of the 14th Amendment. This argument misconceives the point in the case at Bar. There is no question involved here as to the power of the State of Maryland to repeal *in toto*

the legislative evidentiary rule of exclusion embodied in the Bouse Act, and thereby revert to the former judicial rule of inclusion for misdemeanor cases as well as for felonies. Such action would not involve class legislation with the concomitant necessity, as in the case at Bar, of finding a "reasonable ground of difference" to support the discrimination inherent in the challenged statute. In the case at Bar, the basic challenge to the statute involved is grounded upon the fact that all three of the classifications which it makes are arbitrary and without any rational basis to support them, and, therefore, it deprives the Appellant of the equal protection of the laws as provided in Section 1 of the 14th Amendment of the Constitution of the United States. Nor is there any question here of a denial of Due Process except to the extent that the challenged statute may be construed as affirmatively sanctioning an arbitrary invasion of the citizen's immunity from unreasonable search and seizure. *Wolfe v. Colorado*, 338 U. S. 25 (1949). The extent to which the statute contains such an affirmative sanction will be discussed later in this brief.

At the two oral arguments in the Court of Appeals of Maryland, it was virtually conceded by the State that there was no difference between conditions in Anne Arundel County and elsewhere in the State which would furnish a reasonable basis for the discrimination inherent in the challenged statute. The principal contention of the State was that the only authorities in point here are those dealing with the right of a State to make territorial discriminations in regulating the administration of justice and judicial procedure within its boundaries. The State's greatest reliance was upon *Missouri v. Lewis*, 101 U. S. 22 (1880), and the decisions of the Supreme Court which have cited and followed it. From these decisions, the State distilled a principle, the essence of which is that in cases involving the

administration of justice and judicial procedure the admitted *power* to set up territorial classifications is not subject to the otherwise basic requirement that class legislation must not be arbitrary and must be founded upon a reasonable difference between conditions in the territory selected and elsewhere in the State. The Court of Appeals of Maryland adopted this distorted view of *Missouri v. Lewis*. In sustaining the statute now challenged, the Court, relying upon *Missouri v. Lewis*, expressly held that the Equal Protection Clause of the federal Constitution, "has no reference to municipal or territorial arrangements made for different portions of the State" (94 A. 2d at p. 284). After making this flat statement, the Court sought to temper its clear implication by paying lip service to the requirement of "reasonableness". The arrangements in question should not, the Court added, "injuriously affect or discriminate between persons or classes of persons within the municipalities or counties for which such regulations are made" (Ibid.). However, the Court made no attempt to point out any possible difference between prohibited gambling in Anne Arundel County and elsewhere in the State. Indeed, it must be conceded that the odds on the "Bob-tailed Nag" are the same whether the bet is made in Annapolis (Anne Arundel County) or Cumberland (Allegany County) or Baltimore City. The mathematical odds on making a "Seven" remain constant no matter where the dice are rolled. The Court gave no indication that any difference existed between book-makers and lottery operators. Nor did the Court make even a passing reference to any possible difference in Anne Arundel County between various misdemeanors which might justify treating persons charged with gambling in that County differently from those malefactors who operate bawdy houses, illegal stills or engage in a conspiracy to commit the most heinous crime there (all being misdemeanors).

This clear misinterpretation of *Missouri v. Lewis*, has already received critical comment in at least one law journal (33 Boston University Law Rev. 410). In that case, the Supreme Court of the United States sustained the validity of a Missouri statute and constitutional provision which allowed an appeal to the highest court of that State from a final judgment of the Circuit Courts of certain Counties. Other Counties were excepted from these provisions, and a separate appeal court was provided for them. The language of the opinion, which was relied upon by the Court of Appeals of Maryland in the case at Bar, was nothing more than an abstract statement of the principle which sustained the *power* to set up territorial classifications and which, for the purpose of its statement, ignored or rather assumed the requirement that there be some reasonable basis for the discrimination. The abstract statements contained in *Missouri v. Lewis*, which have been frequently quoted and relied upon, are authority only for the *power* to classify, and they have no bearing on the important question of *reasonableness*. In any case of classification, whether the subject matter of the legislation involves taxation, licensing, economic activities or judicial administration and procedure, two questions are invariably presented and must be determined. The first question is the *power* to classify and the second is the *reasonableness* of the particular classification. In the recent case of *Maryland Coal and Realty Co. v. Bureau of Mines*, 193 Md. 627 (1949), the Court of Appeals recognized the dual problem and struck down an arbitrary and unreasonable territorial classification even though the *power* to classify the particular subject matter was found to exist.[3] However, in the

[3] In the case cited the statute purported to regulate the "strip mining" of coal on a state-wide basis. Garrett County was excepted from the operation of the law. The Court held the exclusion of

case at Bar, the Court of Appeals of Maryland, while correctly holding that the *power* to classify existed, ignored its decision in the case last cited and erroneously concluded that since the subject matter of the challenged statute related to judicial administration and procedure it was not necessary to find *reasonableness* because the Equal Protection Clause of the federal Constitution does not apply to such territorial arrangements.

Missouri v. Lewis does not support such a conclusion. Indeed, practically all the Supreme Court decisions which cite and rely upon *Missouri v. Lewis* either assume "reasonableness" of the classification without discussion because it was immediately suggested to the most ordinary intelligence and perception or expressly found its existence in the unequal distribution of population in the territories affected. For illustrations of the former category, see: *Maxwell v. Dow*, 176 U. S. 581 (1900); *Mallett v. North Carolina*, 181 U. S. 589 (1901); *Gardner v. Michigan*, 199 U. S. 325 (1905); *Graham v. W. Virginia*, 224 U. S. 616

Garrett County invalidated the statute even though it was otherwise a valid exercise of the State's police powers. The Court said (193 Md. at 642-3):

> "But it is equally clear that the power of the Legislature to restrict the application of statutes to localities less in extent than the State, as the exigencies of the several parts of the State may require, cannot be used to deprive the citizens of one part of the State of the rights and privileges which they enjoy in common with the citizens of all other parts of the State, *unless there is some difference between conditions in the territory selected and the conditions in the territory not affected by the statute sufficient to afford some basis, however slight, for classification. Dasch v. Jackson*, 170 Md. 251, 270.
>
> "* * * *There is no difference in conditions that would make strip mining a menace to public health and safety in Allegany but harmless in Garrett. There is no rational basis for the territorial classification for discrimination between Garrett and Allegany Counties.* It violates the equal protection clause of the Fourteenth Amendment and article 23 of the Maryland Declaration of Rights" (Italics supplied).

(1912); *Ocampo v. United States*, 234 U. S. 91 (1914); *Ohio v. Akron Metrop. Pk. Dist.*, 281 U. S. 74 (1930).[4] For illustrations of the second category, see: *Hayes v. Missouri*, 120 U. S. 68 (1887); *Morris v. Alabama*, 302 U. S. 642 (1937), a per curiam dismissal of an appeal from the highest court of Alabama, whose opinion in 175 So. 283

---

[4] *Mallett v. N. Carolina*, 181 U. S. 589 (1901), where the allowance of an appeal to the *State* from a ruling of the Criminal Court of one district granting defendant a new trial but not from the Criminal Court of another district was held not to be a denial of equal protection. There was no reference to or discussion of the question of "reasonableness." The statute in question having been passed subsequent to commission of the offense, the principal question was whether it amounted to an ex post facto law. In discussing this question the Court used language which points up the difference between the subject matter of the N. Carolina law before it and the statute now at Bar. The former, the Court held, involved no "substantial right or immunity possessed" by the accused (181 U. S. at 597).

Ocampo v. United States, 234 U. S. 91 (1914) involved a construction of the Constitution of the Philippine Islands and held that a statute which denied a preliminary examination to persons charged with crime in Manila was not a denial of equal protection under their constitution, although such right was accorded to persons charged with crime elsewhere in the Islands. The statute in question, however, provided other safeguards to the inhabitants of Manila by restricting its application to cases where "the prosecuting attorney, after a due investigation of the facts, shall have presented an information against the accused". (An analogy may be found in the statutory provisions of Maryland which permit trial in the counties on the original warrant — as was done in the case at Bar — while requiring formal presentment and indictment by a Grand Jury in Baltimore City for the same offense. *Callahan v. State*, 156 Md. 459 (1929).) The Court quoted *Missouri v. Lewis* only to show there was *power* to make territorial classifications. "Reasonableness" of the classification was assumed without discussion, presumably, on the very obvious basis of the difference between Metropolitan Manila and the sparsely settled and sometimes primitive conditions existing in other parts of the Philippine Islands.

Ohio v. Akron Metrop. Pk. Dist., 281 U. S. 74 (1930), where the Court held equal protection was not denied by a provision of the Ohio constitution which prohibited the Ohio Supreme Court from declaring any statute unconstitutional without the concurrence of at least all but one of the judges except in the affirmance of a judgment of a lower Court declaring a law unconstitutional. No question

expressly found reasonableness in the classification based on population differences; *Fort Smith v. Board of Improvement*, 274 U. S. 387, 391 (1927); *Jannett v. Windham*, 290 U. S. 602 (1933), a per curiam affirmance of an appeal from the highest court of Florida, whose opinion in 147 So. 296, expressly held that in view of the population differences involved "the provisions of the statute are based on a just and reasonable classification with reference to the subject regulated".[5]

---

of territorial classification was involved because "the provision of the State constitution which is attacked is one operating uniformly throughout the entire State" (281 U. S. at 81).

The same is true of *Graham v. W. Virginia*, 224 U. S. 616 (1912), where an "habitual criminal" statute was sustained; and of *Maxwell v. Dow*, 176 U. S. 581 (1900), which sustained a state-wide statute providing for a jury of 8 instead of 12 in non-capital criminal cases.

Gardner v. Michigan, 199 U. S. 325 (1905), sustained a statute which provided for the compiling of jury lists by appointed officials in one county whereas the lists were compiled by elected officials in other parts of the State. The Court quoted from *Missouri v. Lewis* merely to show that the *power* of a State to make territorial classifications was firmly established. There was no reference to or discussion of the question of "reasonableness". It was obviously assumed on the basis of population or other legitimate differences prevalent in the district affected.

[5] *Hayes v. Missouri*, 120 U. S. 68 (1887), sustained a statute giving the State 15 peremptory jury challenges in cities with over 100,000 population and 8 challenges elsewhere in the State. The Court expressly found that population differences furnished the requisite "reasonable basis" for the classification. Thus at page 71, Justice Field said: "In our large cities there is such a mixed population, there is such a tendency of the criminal classes to resort to them and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors. And to that end it may be a wise proceeding on the part of the legislature to enlarge the number of peremptory challenges in criminal cases tried in those cities."

Morris v. Alabama, 302 U. S. 642 (1937), was a per curiam dismissal of an appeal from the highest Court of Alabama for want of a substantial federal question, citing *Missouri v. Lewis*. The opinion of the Court of Appeals of Alabama is found in 175 So. 283, and it shows that the statute in question provided different methods of

The Supreme Court has clearly and expressly recognized that the abstract statement of the power to classify as laid down in *Missouri v. Lewis* is subject to the qualification that there must be a reasonable basis for the classification. In addition to the cases cited above, attention is directed to *Atchison, Topeka, etc. Rwy. Co. v. Matthews*, 174 U. S. 96, 105, 106 (1899), where the Court expressly cited *Missouri v. Lewis* as belonging in that category of cases where the statute in question was sustained because there appeared to be some reasonable basis for the classification and where the Court said: "Even where the selection is not obviously arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished the same conclusion of unconstitutionality is affirmed." To the same effect is *Truax v. Corrigan*, 257 U. S. 312, 336

---

jury selection in criminal cases in different Counties of the State which were classified according to population. Population difference was the express basis of the Alabama Court's finding of "reasonableness" in the classification.

Jannett v. Windham, 290 U. S. 602 (1933), was a per curiam affirmance (citing *Missouri v. Lewis*) of a decision of the highest Court of Florida which sustained a statute imposing certain restrictions on small loan companies operating in Counties having a population of 40,000 or more. Companies operating elsewhere were exempt from the restrictions. The majority opinion of the Florida Court (147 So. 296) expressly held that "the provisions of the statute are based on a just and reasonable classification with reference to the subject regulated." Cf. dissenting opinion of one of the judges.

In *Fort Smith v. Board of Improvement*, 274 U. S. 387, 391 (1927) the Court expressly found a "reasonable basis" to support a classification which imposed an assessment upon certain street railways for street paving while exempting others. After citing *Missouri v. Lewis* for the proposition that the "14th Amendment does not prohibit legislation merely because it is special or limited in its application to a particular geographical or political subdivision of the State", the Court said: "Nor need we cite authority for the proposition that the 14th Amendment does not require the uniform application of legislation to objects that are different, *where those differences may be made the rational basis of legislative discrimination*" (Italics supplied).

(1921). In the dissenting opinion of Justice Brandeis in *Louisville Gas Co. v. Coleman*, 277 U. S. at 44, footnote 1, *Missouri v. Lewis* is expressly catalogued with cases which have sustained classifications based on population differences. In *Holden v. Hardy*, 169 U. S. 366, 388, 389 (1898), after quoting from *Missouri v. Lewis* to show that each State has the right and power to adopt any system of laws or judicature it sees fit for any part of its territory, the Supreme Court said, at p. 389:

> "We do not wish, however, to be understood as holding that this power is unlimited. * * * the 14th Amendment contains a sweeping provision forbidding the states from * * * denying * * * the benefit of due process or equal protection of the laws."

Brown v. New Jersey, 175 U. S. 172 (1899) contains a similar statement.[6]

It is thus apparent that the Court of Appeals has misinterpreted the decision in *Missouri v. Lewis*. However

---

[6] At page 175 of 175 U. S., Mr. Justice Brewer said:

> "The State has full control over the procedure in its Courts, both in civil and criminal cases; subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."

The Court's attention is directed to the fact that on the State's brief in support of its motion to dismiss this Appeal (p. 13) *Brown v. New Jersey* was cited to support its position in the case at Bar, and the following language was quoted from page 177 of 175 U. S.: "* * * A State may make different arrangements for trials under different circumstances of even the same class of offenses * * *" From this the State concluded at page 13 of its brief in support of its motion to dismiss this appeal: "Certainly, therefore, if there may be a discrimination within the same class of offenses, there is no reason why the Legislature could not discriminate between different classes of offenses." The quotation from *Brown v. New Jersey*, relied upon by the State, is taken out of context and does not support the principle of classification contended for by the State. Indeed, at page 177, Mr. Justice Brewer said that the case did not involve territorial or any other type of classification. The challenged statute provided that in all criminal cases where the trial is before an "ordinary jury" each side should have 20 peremptory challenges but where it is before a "struck jury" the number of such challenges

broad the power of a State to set up territorial classifications with respect to systems of laws or judicature, it is subject to the requirement of reasonableness inherent in the Equal Protection Clause of the 14th Amendment. In the cases cited and referred to above, the practical necessities of judicial administration in dealing with a population unequally distributed over a State was the very basis for sustaining (either expressly or impliedly) statutes setting up a variety of criminal or appellate courts, regulating the right to a jury trial or the State's right to appeal, and specifying the political sub-divisions in which preliminary hearings in criminal cases are or are not allowed, etc. In the case at Bar there are no such considerations to sustain the challenged statute. Population differences are wholly irrelevant and bear no reasonable relation to the subject matter of the challenged statute. (See *Commissioner of Public Welfare v. Torres*, 31 N. Y. S. 2d 101 (1941), hereinafter discussed.) This is clearly demonstrated by the fact that if the defendant procures a change of venue, and the trial is held in a non-exempt County, regardless of its size, the defendant would be entitled to the benefit of the statutory rule of exclusion applicable in the latter jurisdiction. At the first oral argument of this case in the Court of Appeals of Maryland, Chief Judge Charles Markell (who was retired after writing the first opinion in this case,

---

was limited to 5. In answer to the claimed denial of equal protection, Mr. Justice Brewer said (p. 177):

> "* * * in all cases in which a struck jury is ordered, the same number of challenges is permitted, as similarly in all cases in which the trial is by an ordinary jury. Either party, state or defendant, may apply for a struck jury, and the matter is one which is determined by the Court in the exercise of a sound discretion. There is no mere arbitrary power in this respect, any more than in the granting or refusing a continuance. The fact that in one case the plaintiff or defendant is awarded a continuance and in another is refused does not make in either a denial of the equal protection of the laws."

93 A. 2d 280, and who was no longer on the bench when the case was reargued) expressly stated that he could not see any possible difference in relation to the subject matter at Bar between Anne Arundel County and those Counties which bordered upon it, such as Calvert and Howard Counties, which might justify different treatment. He pointedly asked the Assistant Attorney General, who argued the case for the State of Maryland—appellee, whether he could suggest any such difference. The Assistant Attorney General frankly admitted that he could not.

However, in the State's brief in support of its motion to dismiss this appeal (pp. 12-13), the Attorney General of Maryland declared that a number of reasons could be conceived to justify the challenged classification. One of these, it was suggested, was the recent influx of gamblers into Anne Arundel County (of which, incidentally, there was no supporting evidence.) Further, the State's brief argued, the classification as to gambling finds support in the recent publicizing of the fact that gambling not only has an evil effect upon persons who are its victims, but, through the manipulations of those who conduct it, it tends to corrupt our political institutions. The State also argued that "the Appellant's contention really resolves to the difficult balancing of the right of persons to be secure in their privacy against the social need that the criminal law shall be enforced." (Page 8 of the State's brief in support of its motion to dismiss this appeal.)

No matter how the State may twist or shape the argument it remains crystal clear that every assumption of fact which it makes to support the challenged classification requires the further assumption that Chapter 704 of the Acts of 1951 meets the suggested evil by "authorizing" the police, through a sort of "negative direction", to ignore the constitutional immunities and to invade the privacy of the citizens of Anne Arundel County at will. Indeed,

the State's Attorney and police of Anne Arundel County as well as the trial court proceeded upon this latter pernicious assumption that the challenged statute gave the police the "right" to break down Appellant's door with an axe (R. 5, 7, 8).[1] No longer need the police of Anne Arundel County concern themselves with the procurement of a search warrant, for which full and adequate provision is made under the laws of the State of Maryland. (Art. 27, secs. 328, 329, Md. Code, 1951.) In short, the State's argument resolves itself into an assumed legislative intention, which may be thus expressed: "We want to retain the constitutional immunities of the citizens of all other parts of the State because the shoe of protection is a comfort to us there, but we want to be rid of them in Anne Arundel County because the shoe pinches us there."

As thus applied and interpreted, the challenged statute, through a sort of "negative direction", contains the kind of "affirmative sanction" to override the constitutional barrier which violates the Due Process Clause of the Fourteenth Amendment. *Wolfe v. Colorado*, 338 U. S. 25 (1949). (See Ex Parte Rhodes, 79 So. 462 (Ala. 1918), where the invalidated statute, as construed by the Court, contained an affirmative authorization to arrest and search and seize

---

[1] At page 5 of the Record it appears that the Trial Court, in stating the question before it on the Appellant's motion to suppress the evidence, said:

> "* * * If they [the police] had a *right*, assuming that the Bouse Act had been amended and that amendment is validated, they wouldn't have to worry about a misdemeanor or the commission of any kind, they would have a *right* to go into the premises on the assumption the amendment of the Bouse Act gave them that *right*" (Italics supplied).

At page 7, Police Captain Wade testified: "How did you get the door open? A. We forced it open with an axe. * * * (p. 8) * * * Captain, based on these telephone wires, leading to this building, on the basis of this information, you broke into this room, is that right? A. Upon the advice of the State's Attorney."

in misdemeanor cases even though the offense was not committed in the presence of the officer.) It is true that the *Wolfe* case held that the "ways of enforcing" the constitutional immunity against unreasonable search and seizure do not involve any question of due process; but it was also expressly declared in that case that since the security of one's privacy against arbitrary intrusion by the police is basic to a free society, it is implicit in the concept of ordered liberty, and as such, enforceable against the States through the Due Process Clause. "Accordingly", said Mr. Justice Frankfurter, who wrote the majority opinion, "we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment" (338 U. S. at 27, 28).

The State seeks to overcome the barrier of the *Wolfe* case by disclaiming for the challenged statute any intention to confer a "right" to search and seize in violation of the constitutional immunity. The State does not deny that the obvious effect of the statute, as clearly demonstrated by the Record in the case at Bar, is to incite and encourage the police of Anne Arundel County to ignore the constitutional immunities of the citizens of that County at will in cases of suspected gambling. It argues, however, that this incitement and encouragement to the police is not the kind of "affirmative sanction" which this Court condemned in the *Wolfe* case because it is inherent in the state rule of admissibility which this Court sustained in that case as not offensive to the Due Process Clause. The fallacy of the State's argument, however, lies in the fact that the case at Bar does not involve a contest between the federal rule of exclusion and the State rule of admissibility. Nor does it involve a question of "balancing of the right of persons to be secure in their privacy against the social need

that the criminal laws be enforced." Here we are confronted with class legislation, and the State is urging the necessities of effective policing as the "reasonable ground of difference" to support the discrimination involved. On this basis the legislation now attacked would be utterly meaningless as a proposed remedy for the evils assumed and as a balance between the rights of the citizen and enforcement of the criminal law unless its clear and unmistakable purpose was to free the police from constitutional restraints and thus lessen the difficulty of convicting persons charged with crime by encroaching upon these restraints. Here the "relation to the object sought to be accomplished" is patently grounded upon the assumed "right" and "direction" to search and seize in violation of the constitutional immunity. This is forbidden under the doctrine of the *Wolfe* case. The means to the otherwise justifiable end is thus illegal, and it cannot be considered just and reasonable for the purpose of supporting the challenged classification. If full force be given to the State's disclaimer of a "right" and "direction" to search and seize without regard to the constitutional immunity, then the challenged statute and the classifications it makes are utterly pointless and without any imaginable relation to the admitted legislative objective of facilitating the apprehension and conviction of suspected gamblers in Anne Arundel County.

Another weakness in the State's belated assignment of "reasons" for the challenged statute lies in its utter failure to explain the patently unequal application of the law within the borders of Anne Arundel County in view of the fact that persons charged there with violating the local gambling laws or the state-wide lottery laws are still protected by the statutory rule of exclusion of illegally procured evidence.

III.

Rules of Evidence are not Immune From Applicable Constitutional Limitations.

The Court of Appeals of Maryland, in making the erroneous application of the doctrine announced in *Missouri v. Lewis*, 101 U. S. 22, to which reference has already been made in this brief, laid great stress upon the fact that the challenged "statute does no more than prescribe a rule of evidence" (94 A. 2d at 284). The Court completely ignored the statement contained in 2 Cooley, Const. Limitations (8th Ed.) pp. 768-769, which had been called to its attention, namely, that "there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence * * * its authority is practically unrestricted, *so long as its regulations are impartial and uniform.*" (Italics supplied.) Rules of evidence have never been regarded by this Court as immune from applicable constitutional limitations. In striking down a Missouri test oath in *Cummings v. Missouri*, 4 Wall. 277 (1867), Mr. Justice Field, speaking for this Court, said:

> "The clauses in question subvert the presumptions of innocence and alter the rules of evidence, which heretofore, under the universally recognized principles of the Common Law, have been supposed to be fundamental and unchangeable."

A closer analogy is to be found in those cases which have dealt with statutory rebuttable presumptions. Thus in *Mobile, etc. R.R. Co. v. Turnipseed*, 219 U. S. 35, 43 (1910), this Court said:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of equal protection of the law, it is only *essential that there shall be some rational connection* between the fact proved and the ultimate

fact presumed, and that the inference of one fact from proof of another *shall not be so unreasonable as to be a purely arbitrary mandate.*" (Italics supplied.)

(See also, 4 Wigmore on Evidence (3rd Ed.), sec. 1356, pp. 724, et seq.)

The two cases which bear the closest analogy to the case at Bar involved a discriminatory rule of evidence, but the Court of Appeals of Maryland, relying upon other decisions clearly not in point, expressly refused to follow them (94 A. 2d at 284).* These cases were decided by the New York

---

* Instead, the Court, in addition to *Missouri v. Lewis*, relied by way of analogy upon *Davis v. State*, 68 Ala. 58 (1880); *People v. Hanrahan*, 75 Mich. 611 (1889); and *Ohio, ex rel. Lloyd v. Dollison*, 194 U. S. 445 (1904). The Court declared that these authorities stand for the general proposition that the equal protection of the laws is not denied by statutes which declare that certain acts are criminal in some counties but not in others (94 A. 2d at 285). An examination of these authorities will disclose that they are not in point and do not support the underlying *ratio decidendi* of the decision of the Court of Appeals of Maryland in the case at Bar, which is that there is no necessity for a finding of reasonableness in a territorial classification which purports to regulate judicial procedure in various parts of the State because the Equal Protection Clause of the 14th Amendment has no application to such regulations. Thus in *Davis v. State*, the Alabama Court expressly referred to a reasonable basis for the statute which made it unlawful within certain counties to transport any cotton in the seed after sunset and before sunrise of the succeeding day. The Court said (see p. 63 of 68 Ala.):

> "Its object is to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which in the opinion of the law-making power may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits to the public detriment, at least within the specified territory."

People v. Hanrahan, did not involve a statute making acts criminal in one County and not in others. The statute in question involved a Home Rule provision of an Illinois Act which granted power to the City of Detroit to prohibit houses of ill fame in that City and to prescribe the penalty for violation of any ordinance passed pursuant thereto. The ordinance passed pursuant to the enabling act was sustained although it prescribed a different penalty

Appellate Division, First Department. The first is *Krushel v. Ladutko*, 11 N. Y. S. 2d 747 (1939), aff'd. on other grounds 281 N. Y. 655. The second is *Commissioner of Public Welfare v. Torres*, 31 N. Y. S. 2d 101 (1941). In the *Ladutko* case, the Court had before it a statute which in substance provided that in Paternity Proceedings in New York City, the mother of the "natural child" and her husband shall be permitted to testify to non-access. The common law rule, rendering such evidence inadmissible, applied elsewhere in the State of New York. In holding the statute a violation of the Equal Protection Clause of the 14th Amendment, the Court said, at p. 749:

> "The statute which undertakes to effect a change in the common law rule by allowing such proof within the City of New York while such testimony is still inadmissible in the rest of the State, is based upon no reasonable ground for the distinction it makes. * * * This differentiation within the borders of the State should be based upon reasonable grounds. [Citing cases, including *Missouri v. Lewis*.] The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. * * * Here there appears to be no just or rational basis for the distinction made by the statute in question, and it is * * * unconstitutional."

In the *Torres* case an amendment to the Domestic Relations Law of New York provided in effect that in Paternity Proceedings conducted in New York City testimony of non-

---

than was prescribed by the state-wide law against maintaining houses of ill fame.

Ohio, ex rel. Lloyd v. Dollison, involved a local option law regulating the liquor traffic in a certain township. It has long been settled that such laws are in a different category as "the state has absolute power over the subject. It does not abridge that power by adopting the form of reference to a local vote". (See *Rippey v. Texas*, 193 U. S. 504, 510.)

access by a person other than the defendant must be corroborated. In other parts of the State, the statute permitted such testimony without corroboration. In striking down this statute the Court rejected population differences as a basis for sustaining the classification and said, at p. 104:

> "But the discrimination herein cannot reasonably be construed as affecting an evil that exists only in one City of the State and has no existence in all other parts of the State."

The law is thus clear that classification in the field of remedial evidentiary rules must be supported by some reasonable ground of difference which justifies applying one rule of evidence in a single county and an altogether different rule elsewhere in the State in identical cases. Wherein lies a distinction between suspected gamblers which would justify applying one rule of evidence to some of them and another rule to others merely on the basis of the City or County in which they are suspected of gambling? Is the challenged statute the "one rule for rich and poor, for the favorite at court and the countryman at plough" of which Locke speaks (Locke on Civil Government, sec. 142) when the "favorite" of the City is sent home free because the evidence was illegally procured and the "countryman" of Anne Arundel County is imprisoned on the same evidence?

IV.

The Second and Third Classifications Inherent in the Challenged Statute Involve Arbitrary and Unreasonable Discrimination Between Classes of Persons in Anne Arundel County who are Similarly Situated and who are Thereby Denied the Equal Protection of the Laws.

Aside from the unreasonableness of the primary territorial classification of the challenged statute, the secondary

classification whereby "gambling" is selected for discriminatory treatment from the great body of misdemeanors is a clear denial to Appellant of the equal protection of the laws. By virtue of the challenged statute, one charged in Anne Arundel County as an operator of a bawdy house or an illegal still or as having conspired with another to commit the most heinous crime (all misdemeanors under the law of Maryland) is protected in the full enjoyment of his constitutional immunities, while a citizen charged with gambling in Anne Arundel County is beyond the pale of this same full protection. With relation to the subject matter at Bar, it is impossible to conceive any rational difference between particular classes of misdemeanants in Arundel County which would support the discrimination against suspected gamblers. The Court of Appeals of Maryland certainly did not find or even suggest any such difference. Indeed no one would suggest that bootleggers, bawdy house operators and conspirators are easier to catch and convict in Anne Arundel County than gamblers, even if such a consideration could properly be employed to sustain the kind of discrimination involved in the challenged statute.

In *Commissioner of Public Welfare v. Koehler*, 30 N. E. 2d 587 (N. Y. 1940), a state-wide statute permitting evidence in Paternity Proceedings of non-access by the husband of the mother of a "natural child" was sustained even though in other types of cases such evidence is excluded by the applicable common law rule. The Court said, at p. 591:

> "It is not unreasonable that in a statutory proceeding to enforce a duty imposed by statute upon the father of a 'natural child' the mother of the child and her husband should be permitted to give testimony which they would not be permitted to give where an adjudication of the status of the child is sought. * * *

> the foundation of the rule is much firmer when it is invoked for the protection of the child or of the parties to the marriage or of the public, than when invoked as a shield by an alleged adulterer against liability for the consequences which follow from his wrong."

The *Koehler* case clearly demonstrates the necessity for and the kind of rational basis which is required to sustain the application of one rule of evidence to a particular class of cases and a different rule to other cases. In the absence of such a reasonable basis for the discrimination, the rule of evidence would be lacking in that degree of impartiality and uniformity which is essential to its constitutional validity. See Cooley, Const. Limitations (8th Ed.), vol. 2, pp. 768-769. In the case at Bar there is no reasonable difference between various categories of misdemeanants in Anne Arundel County which would justify the admission of illegally procured evidence against one and its exclusion against all others. All misdemeanants in Anne Arundel County are in the same class. Here, indeed, is the very discrimination "between persons or classes of persons within the municipalities or counties for which such regulations are made" which the Court of Appeals of Maryland, in its lip service to the requirement of "reasonableness", conceded ran counter to the 14th Amendment. 94 A. 2d at p. 284, *supra*.

The arbitrary and discriminatory operation of the challenged statute is even more forcibly demonstrated when we consider the third classification which is involved. The exempting provision of the statute applies in Anne Arundel County only "in the prosecution of any person for a violation of *the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gaming'*, or in any laws amending or supplementing said sub-title." (Italics supplied.) Art. 35, sec. 5, Code of Public General Laws of Mary-

land, 1951 edition. The italicized reference is to the state-wide gambling laws, exclusive of the sections which prohibit lottery.[9] Under public local laws enacted by Chapters 271 and 290 of the Acts of 1898 and applicable only to Anne Arundel County, it is made a misdemeanor to wager or make book on the result of any horse race in Anne Arundel County or to wager at any game played with dice in that County. Art. 2, secs. 292, 293, Code of Public Local Laws of Maryland, 1930 edition. (Also codified in Flack's Code of Public Local Laws of Anne Arundel County (1947) as secs. 338, 339.) Thus, if the offender is charged in Anne Arundel County with a violation of the local gambling laws he is sent home free because the evidence was illegally procured, but if he is there charged with violating the state-wide gambling laws he is imprisoned on the same evidence. In addition, the exempting proviso is limited to violations of sections 303-329, which proscribe book-making and certain other forms of gambling, but do not include lottery. Lottery operations are proscribed by sections 423-438, 642-651 of Article 27, Maryland Code, 1951. Thus in Anne Arundel County lottery operators are sent home free while bookmakers are imprisoned on the same evidence. Here the discrimination is so patently arbitrary as to require no further illustration or argument.

V.

The Challenged Statute can Draw no Support or Vitality From a Mere Presumption of Validity.

In an attempt to bolster its decision, the Court of Appeals of Maryland referred in its opinion to the presumption of reasonableness and constitutionality which generally attends a legislative enactment (94 A. 2d at p. 284). Aside

[9] For abstract of the forms of gambling proscribed by sections 303-329, see note 1, *supra*.

from any other considerations, such a presumption cannot save a statute, such as the one at Bar, which proposes a classification manifestly and obviously arbitrary and unreasonable on its face. It was expressly so held in *Bailey v. Drexel*, 259 U. S. 20, 37, 38. See also 2 Sutherland, Statutory Construction (3rd Ed.) sec. 4509. The rule is the same in Maryland.[10]

In the case at Bar the subject matter of the challenged statute impinges upon one of the most fundamental immunities of the citizen, namely, the right to be secure in one's privacy against arbitrary intrusion by the police. As was said in *Wolfe v. Colorado*, 338 U. S. 25, at pp. 27, 28 (1949):

> "* * * It is, therefore, implicit in the 'concept of ordered liberty' and as such, enforceable against the States through the Due Process Clause. * * * Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment."

Where the subject matter of a challenged statute deals with one of the fundamental immunities of the citizen it is not entitled to the same presumption of reasonableness and constitutionality which usually attends other types of legislation. *United States v. C. I. O.*, 335 U. S. 106, 140 (1948); *Ex Parte Endo*, 323 U. S. 283, 299 (1944); *Byars v. United States*, 273 U. S. 28, 32 (1927); *Ex Parte Rhodes*, 79 So. 462, 464, 465 (Ala. 1918), quoting Justice Bradley in *Boyd v. United States*, 116 U. S. 616; *"The First Ten Amendments"*,

---

[10] Thus see *State v. Potomac*, 116 Md. 380 (1911); *Kelman v. Ryan*, 163 Md. 519 (1933); *Dasch v. Jackson*, 170 Md. 251 (1936); and *Blaustein v. State Tax Commission*, 176 Md. 423 (1939), where discriminating legislation was invalidated on the pleadings because the proposed classification was manifestly arbitrary and unreasonable on its face.

by Paul G. Kauper, 37 Amer. Bar Asso. Jr. 717, 718 (1951); *American Jurisprudence, Const. Law*, secs. 59-60. The statute involved in the case at Bar is such a statute, and it can draw no support or vitality from a mere presumption of validity.

CONCLUSION

It is respectfully submitted that the Court of Appeals of Maryland has misconstrued and misapplied the decision of the Supreme Court in *Missouri v. Lewis*, 101 U. S. 22 (1880) and other relevant and controlling decisions. The challenged statute is unconstitutional and void because the discriminations it purports to make do not rest upon any reasonable basis which bears a legitimate relation to the evil sought to be corrected. The admissibility of the evidence upon which Appellant stands convicted was dependent upon the constitutional validity of the challenged statute. Accordingly, the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

HERBERT MYERBERG,
JOSEPH LEITER,
LOUIS M. STRAUSS,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~712~~ 38

JULIUS SALSBURG,

Appellant,

vs.

STATE OF MARYLAND,

Appellee

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM AND BRIEF IN SUPPORT THEREOF.

EDWARD D. E. ROLLINS,
Attorney General;
J. EDGAR HARVEY,
Deputy Attorney General;
AMBROSE T. HARTMAN,
Assistant Attorney General,
Attorneys for Appellee,
1201 Mathieson Building,
Baltimore 2, Maryland.

INDEX

Table of Contents

Table of Citations

Cases

Statutes

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 712

JULIUS SALSBURG,

vs. *Appellant,*

STATE OF MARYLAND,

Appellee

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM

To the Honorable, the Justices of the Supreme Court of the United States:

The State of Maryland, Appellee in the above entitled cause, respectfully moves this Honorable Court to dismiss the above entitled appeal or, in the alternative, to affirm the judgment of the Court of Appeals as to the Appellant Julius Salsburg, and for reason in support of said Motion, respectfully represents that the appeal fails to present any substantial Federal question.

Respectfully submitted,

EDWARD D. E. ROLLINS,
Attorney General;
J. EDGAR HARVEY,
Deputy Attorney General;
AMBROSE T. HARTMAN,
Assistant Attorney General,
Attorneys for Appellee,
1201 Mathieson Building,
Baltimore 2, Maryland.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 712

JULIUS SALSBURG,

Appellant,

vs.

STATE OF MARYLAND,

Appellee

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM

Statement of Facts

This is an appeal from a final judgment of the Court of Appeals of Maryland, entered on February 5, 1951, affirming a judgment of the Circuit Court for Anne Arundel County. The opinion of the Court of Appeals is reported in 94 A. 2d (Adv. Shts.) 280.

The proceedings originated in the Circuit Court for Anne Arundel County where the Appellant and two other persons by the names of Joseph Rizzo and William Nicholson were convicted of bookmaking, which is a misdemeanor by statute. See Section 306 of Article 27 of the Annotated Code of Maryland (1951 Ed.). The Appellant and the two per-

sons convicted with him appealed to the Court of Appeals, where they contended:

(1) That their conviction was based upon evidence secured by an illegal search and seizure, and;

(2) That the statute under which the evidence was held admissible is unconstitutional as violative of the Equal Protection Clause, inasmuch as it applied to only three of the twenty-three Counties of the State.

The Court of Appeals held that, inasmuch as Rizzo and Nicholson had demonstrated no interest in the premises which were searched, they could not, under previous decisions of that Court, complain of the illegal search and seizure. The Court of Appeals found that the Appellant Salsburg had demonstrated an interest in the premises as lessee, and ordered re-argument as to him on the constitutional question. See *Rizzo, et al.* v. *State*, — Md. —, 93 A. 2d (Adv. Shts.) 280.

The Appellee readily concedes that the evidence introduced against the Appellant was secured by an illegal search and seizure. The Common Law Rule, in the State of Maryland, is that in prosecutions for both misdemeanors and felonies, evidence otherwise admissible will not be rejected because illegally obtained. See *Meisinger* v. *State*, 155 Md. 195, 141 A. 536; *Lawrence* v. *State*, 103 Md. 17, 63 A. 96. Chapter 194 of the 1929 Laws of Maryland changed this rule in cases of misdemeanors. The statute has been amended a number of times since its enactment, and a number of Counties have been excepted from its provisions in the case of certain gambling violations. The Act, as now codified in Section 5 of Article 35 of the Annotated Code of Maryland (1951 Ed.) reads in part, as follows:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been

procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State * * *. Provided, further, that nothing in this section shall prohibit the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gambling', or in any laws amending or supplementing said sub-title."

Jurisdictional Statement

The Appellee adopts the jurisdictional statement heretofore filed by the Appellant.

Basis of Appeal

The Appellant contended in the Court of Appeals of Maryland and urges in this Court that the exception made to Section 5 of Article 35, *supra*, when applied in trials for violation of gambling laws in Anne Arundel County, serves to deprive a person accused of such violation of the equal protection of the laws and of the due process of law which is guaranteed by the 14th Amendment to the Constitution of the United States.

ARGUMENT

The partial exemption of Anne Arundel, Wicomico and Prince Georges Counties from the provisions of Section 5 of Article 35 of the Code does not violate the due process clause of the 14th Amendment to the Constitution of the United States.

The history of the Maryland law relating to the admissibility of evidence secured by an illegal search and seizure may be summarized as follows:

1. Prior to the enactment of Article 35, Section 5 of the Code, the Court of Appeals held that evidence, otherwise

admissible, would not be rejected because illegally obtained. *Meisinger* v. *State, supra,* and *Lawrence* v. *State, supra.*

2. Section 5 of Article 35, *supra,* made evidence in trials for misdemeanors inadmissible when secured by an illegal search and seizure.

3. The rule in cases of felonies remains the same as it was prior to the enactment of Section 5 of Article 35. *Marshall* v. *State,* 182 Md. 379, 35 A. 2d 115; *Delnegro* v. *State,* — Md. —, 81 A. 2d 241, 244.

4. Amendments made to Section 5 of Article 35, *supra,* exempt from its provisions prosecutions for violations for certain of the gambling laws when the prosecutions occur in Anne Arundel, Wicomico and Prince Georges Counties.

5. The Court of Appeals of Maryland, in the decision presently being appealed, held that the amendments made to Article 35, Section 5, *supra,* serves to reinstate the common law rule in prosecutions for violation of certain of the gambling laws in Anne Arundel County, so that evidence obtained by an illegal search and seizure in said County, if otherwise admissible, will not be excluded.

The Appellant in the closing paragraphs of his argument, under the heading "The Questions are Substantial", suggests that the exemption contained in Article 35, Section 5, *supra,* are a "negative direction", and therefore an "affirmative sanction" to law enforcement officers in the exempted Counties to conduct illegal searches and seizures. He does not question the well settled principle that the 4th and 5th Amendments to the Federal Constitution are limitations on Federal power which do not apply to the States, and that, in a prosecution in a State court, the 14th Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. *Stefanelli* v. *Minard,* 342 U. S. 117; *Wolf* v. *Colorado,* 338 U. S. 25; *Adams*

v. *New York*, 192 U. S. 585; *Johnson* v. *State*, 193 Md. 136, 66 A. 2d 504. However, he relies upon dictum in the case of *Wolf* v. *Colorado*, *supra*, where this Court indicated that "were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment". From the context, it is clear that this Court, in using the term "guaranty of the Fourteenth Amendment", was referring to the due process clause of that Amendment.

There is no affirmative sanction by the Legislature in the present statute. The statute presently in question is in no way similar to the type condemned in a case such as *Ex Parte Rhodes*, — Ala. —, 79 So. 462, where the statute, as construed by the Court, affirmatively authorized arrest and search and seizure in misdemeanor cases where the offense was not committed in the presence of the officer. Here, the statute does not affirmatively authorize the police to conduct unreasonable searches and seizures. Rather, it abrogates the legislatively created rule of evidence and thereby incidentally reinstates the common law rule. Should an officer conduct an unreasonable search and seizure under the mistaken belief that he had the authority to do so under Section 5 of Article 35, *supra*, he could undoubtedly be held personally liable. See *Wolf* v. *Colorado*, *supra*, at page 29 of 338 U. S. where it is observed that although evidence secured by an unreasonable search and seizure may be held admissible by the State court, yet the common law provides action for damages against the searching officer.

The Appellant in his brief makes mention of the fact that the trial court remarked that under Section 5, the officers had a "right" to conduct the search and seizure. This statement was erroneous and the Appellee has never con-

tended that the statute confers such a right nor does it so contend now. The Court of Appeals of Maryland certainly suffers from no such misapprehension as is manifest from its opinion in the present case. See *Salsburg* v. *State, supra,* 94 A. 2d (Adv. Shts.) at page 282.

In the case of *Wolf* v. *Colorado, supra,* this Court indicated that the exclusion of evidence illegally obtained in Federal prosecutions is not an explicit requirement of the 4th Amendment, but rather is a rule of the Supreme Court, created to implement that Amendment. This Court went on to suggest that perhaps Congress has the power, through appropriate legislation, to negate this judicially created rule. Certainly, in view of this Court's condemnation of a State statute which would "affirmatively sanction police incursion into privacy", this Court must have meant that Congress possibly has the power to change the exclusionary rule as applied by the courts, and not to affirmatively direct illegal searches and seizures. It is submitted that Section 5 of Article 35, *supra,* does no more than the converse of what this Court suggested Congress may have the authority to do, viz. it abrogates a legislatively created rule of evidence and thereby reinstates the judicially created rule.

Further, Section 5 of Article 35, *supra,* merely reinstates the rule of evidence which this Court, in the case of *Wolf* v. *Colorado, supra,* and in other cases has held does not violate the due process clause of the 14th Amendment. It is submitted that the Appellant's contention really resolves to the difficult balancing of the right of persons to be secure in their privacy against the social need that the criminal law shall be enforced. This Court has decided that the balancing of these opposing interests is for the States, at least in the absence of action by Congress. See the opinion of Mr. Justice, then Judge, Cardozo in *People* v. *Defore,* 242 N. Y. 13, 150 N. E. 585.

The partial exemption of Anne Arundel County from the provisions of Section 5 of Article 35 of the Code does not deny residents of that county the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

The Appellant admits the power of the State Legislature to enact laws which classify. He urges, however, that there must be a reasonable basis for the classification, and that where the classification is manifestly and obviously arbitrary and unreasonable, it is unconstitutional under the equal protection clause. He contends that the classifications made by the statute in question as to territory (Anne Arundel County) and as to crime (certain gambling violations), are both arbitrary. The Appellee contends that the classification is not obviously arbitrary, that the statute merely prescribes a rule of evidence, and that a wide latitude has been allowed the States in regulating the administration of justice and systems of procedure in State courts.

That the type of territorial classification attempted by Section 5 of Article 35, *supra*, is fully constitutional and valid seems established by a line of cases, beginning with *Missouri* v. *Lewis* (*Bowman* v. *Lewis*), 101 U. S. 22. There, a law of the State of Missouri was upheld which allowed an appeal to the Supreme Court of that State from any final judgment of any Circuit Court where certain Counties were excepted from the provision, and a separate appeal court provided for them. This Court there said:

> "* * * If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which

is enjoyed by other persons or other classes in the same place and under like circumstances.

"The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

Similarly, in the case of *Hayes* v. *Missouri*, 120 U. S. 68, a statute was upheld which provided that in all capital cases excepting cities of over one million inhabitants, the State shall be allowed eight peremptory challenges to jurors, and in such cities, shall be allowed fifteen peremptory challenges.

The case of *Chappell Chem. Fertilizer Co.* v. *Sulphur Mines Co. of Virginia*, 172 U. S. 474, held that the rule in Baltimore City which requires all civil cases to be tried without a jury, unless a jury trial is specifically requested, is constitutional, as not denying residents of Baltimore City the equal protection of the laws.

Thus, the case of *Mallett* v. *North Carolina*, 181 U. S. 589, held that a statute which granted the State an appeal from the granting of a new trial to an accused in criminal cases was not a denial of the equal protection of the laws when this appeal was given in one district of the State and not in another. Thus, in *Ocampo* v. *United States*, 234 U. S. 91, this Court upheld a statute which was attacked as denying the equal protection of the laws which denied to inhabitants of Manila the right to a preliminary examination in criminal cases which right was accorded to all other persons in

the Philippine Islands. Here, as in other cases involving this question, the Court was careful to point out that what was allowed under the statute did not involve a denial of due process of law. The same is true, of course, relative to the admission of evidence secured by an unreasonable search and seizure. For other cases involving the application of the principle announced in *Missouri* v. *Lewis, supra.* See *Brown* v. *New Jersey*, 175 U. S. 172; *Gardner* v. *Michigan*, 199 U. S. 325; *Graham* v. *West Virginia*, 224 U. S. 616; *Ohio* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74.

There have been several cases in which this Court has applied the doctrine of *Missouri* v. *Lewis, supra*, since the decision in 1930 of *Ohio* v. *Akron Metropolitan Park Dist., supra.* In these cases this Court has disposed of the question of denial of the equal protection of the laws in per curiam opinions in which it referred to *Missouri* v. *Lewis, supra.* These cases are *Morris* v. *Alabama*, 302 U. S. 642 and *Jannett* v. *Hardy*, 290 U. S. 602.

It is to be noted that with the single exception of *Hayes* v. *Missouri, supra*, this Court, in the cases above discussed did not go into the question of the reasonableness of the classification made and, in fact, did not even mention the presumption of constitutional validity.

Nor is the classification as to subject matter such as to preclude the assumption that the classification rests upon some rational basis within the knowledge of the legislators. The case of *Semler* v. *Oregon*, 294 U. S. 608 involved a statute which regulated advertising by persons engaged in the profession of dentistry. The plaintiff, a dentist who had been found guilty of violating the statute contended that the statute was arbitrary in that it singled out one profession for regulation. This Court disposed of that contention as follows:

> "* * * Nor has plaintiff any ground for objection because the particular regulation is limited to dentists

and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each. We find no basis for the charge of an unconstitutional discrimination. Watson v. Maryland, 218 U. S. 173, 179, 54 L. ed. 987, 990, 30 S. Ct. 644; Miller v. Wilson, 236 U. S. 373, 384, 59 L. ed. 628, 632, 35 S. Ct. 342, L. R. A. 1915F, 829; Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 43, 70 L. ed. 818, 821, 46 S. Ct. 384; Dr. Bloom Dentist v. Cruise, 288 U. S. 588, 77 L. ed. 967, 53 S. Ct. 320."

The Appellant complains that both classifications made by the present statute are obviously unreasonable. It is well settled where laws are attacked as violating the equal protection requirement, there is presumption in favor of the legislative classification, and that if any state of facts can reasonably be conceived to sustain the classification, the existence of that state of facts, when the law was enacted, must be assumed. See *Metropolitan Insur. Co.* v. *Brownell*, 240 U. S. 580, 584; *Whitney* v. *California*, 274 U. S. 357, 370; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 510; *Alabama State Fed. of Labor* v. *McAdory*, 325 U. S. 450, 465.

A number of reasons could be conceived to justify the classification made in Section 5. One of these was suggested by the Hon. Wm. L. Henderson, Associate Judge of the Court of Appeals of Maryland, at the time of the original argument of this case before that Court. He suggested that the Legislature could take cognizance of the fact that the heavy penalties being imposed by the Criminal Court of Baltimore in gambling cases were driving more gamblers into Anne Arundel County, and that this was causing much concern in that County. Anne Arundel County is adjacent

to Baltimore City. The classification as to gambling finds a rational basis in the fact that it has recently been much publicized that not only does gambling have an evil effect upon persons who are its victims, but also that persons who conduct the gambling enterprises are corrupting our political institutions. In the case of *Brown* v. *New Jersey, supra,* this Court said, at page 177 of 175 U. S.: "* * * A State may make different arrangements for trials under different circumstances *of even the same class of offenses* * * *." Certainly, therefore, if there may be a discrimination within the same class of offenses, there is no reason why the Legislature could not discriminate between different classes of offenses.

The Court of Appeals of Maryland, in its opinion, does not attempt to discover a rational basis for the exceptions in Section 5. However, the Court did state the rule that a classification is presumed to be reasonable as follows:

> "* * * The classification is presumed to be reasonable in the absence of clear and convincing indications to the contrary, and the person attacking the classification has the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369."

It is submitted that the classification made by Section 5 is not manifestly arbitrary and that the Appellant has not sustained the burden of showing that "it does not rest upon any reasonable basis." The Appellee has above suggested a basis for the classification which is certainly reasonable.

Conclusion

It is respectfully submitted that, for the foregoing reasons, the Appellee's Motion to Dismiss the Appeal or, in

e Alternative to Affirm the Judgment of the Court of ppeals of Maryland, should be granted.

Respectfully submitted,

EDWARD D. E. ROLLINS,
Attorney General;
J. EDGAR HARVEY,
Deputy Attorney General;
AMBROSE T. HARTMAN,
Assistant Attorney General,
Attorneys for Appellee,
1201 Mathieson Building,
Baltimore 2, Maryland.

(7561)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 38

JULIUS SALSBURG,

Appellant,

vs.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

EDWARD D. E. ROLLINS,
Attorney General,

J. EDGAR HARVEY,
Deputy Attorney General,

AMBROSE T. HARTMAN,
Assistant Attorney General,
For Appellee.

The Daily Record Co., Baltimore 3, Md.

INDEX

Table of Contents

Table of Citations

Cases

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 38

JULIUS SALSBURG,

Appellant,

vs.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

OPINION BELOW

The Opinion of the Court of Appeals of Maryland has not been published in the official Maryland Reports. It is to be found in 94 A. (2d) 280.

JURISDICTIONAL STATEMENT

Appellee adopts the Jurisdictional Statement set forth on pages 1 and 2 of Appellant's Brief.

STATEMENT OF THE CASE

These proceedings originated in the Circuit Court for Anne Arundel County, where the Appellant and two other persons were convicted of bookmaking, which is a misdemeanor by statute. Section 306 of Article 27 of the Maryland Code (1951 Edition). Certain bookmaking paraphernalia was introduced at the time of the trial over objection that it was secured by an illegal search and seizure. No question of a denial of the equal protection of the laws or the denial of any other constitutional right was directly raised at that time. Appellant and the two persons convicted with him appealed to the Court of Appeals of Maryland, where they contended: (1) That their convictions were based upon evidence secured by an illegal search and seizure; and (2) that the statute under which the evidence was held admissible was unconstitutional and was violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals held that, inasmuch as the two persons convicted with Appellant had demonstrated no interests in the premises searched they could not, under previous decisions of the Court, complain of the illegal search and seizure. The Court of Appeals found that the Appellant Salsburg had demonstrated an interest in the premises as lessee and ordered reargument as to him on the constitutional question. See *Rizzo, et al. v. State*, ... Md. ...., 93 A. (2d) 280. Appellant in his brief on reargument before the Court of Appeals raised only the question of the denial of equal protection of the laws. In his argument before that Court he also raised the question of a denial of due process of law, and the Court of Appeals in its opinion considered both of these contentions. Thus, the Court

of Appeals not only held that equal protection had not been denied but it also found no reason "to hold that the 1951 statute making illegally procured evidence admissible in certain trials in Anne Arundel County, is in conflict with the due process clause of the 14th Amendment". 94 A. (2d) at page 282.

Appellee admits that the record reveals an illegal search and seizure as those terms are defined in prior opinions of the Court of Appeals of Maryland.

SUMMARY OF ARGUMENT

I.

The Amendments to Section 5 of Article 35 of the Maryland Code (1951 Edition) do not deprive one accused of violation of the Gambling Laws in an exempted county of the Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States by reason of the fact that evidence which would not be Admissible in some parts of the State is admitted to help convict him.

II.

The Act here challenged is not repugnant to the equal protection clause of the Fourteenth Amendment.

ARGUMENT

I

THE AMENDMENTS TO SECTION 5 OF ARTICLE 35 OF THE MARYLAND CODE (1951 EDITION) DO NOT DEPRIVE ONE ACCUSED OF VIOLATION OF THE GAMBLING LAWS IN AN EXEMPTED COUNTY OF THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY REASON OF THE FACT THAT EVIDENCE WHICH WOULD NOT BE ADMISSIBLE IN SOME PARTS OF THE STATE IS ADMITTED TO HELP CONVICT HIM.

Up to 1929 Maryland had adhered consistently to the common law rule that the admissibility of evidence in criminal prosecutions is not affected by the manner in which it is obtained. *Meisinger v. State*, 155 Md. 195, 141 A. 536. In 1929, Section 5 of Article 35, *supra*, was enacted to provide State-wide that in misdemeanors evidence obtained by or in consequence of an illegal search and seizure is inadmissible. Left unchanged was the rule in cases of felonies. At the time of Appellant's trial and conviction, the statute in question, Section 5 of Article 35 of the Maryland Code (1951 Edition) had been amended to read as follows:

> "No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case; provided, however, that nothing in this section shall prohibit the use of such evidence in Baltimore County, Baltimore City, Anne Arundel, Caroline, Carroll, Cecil, Frederick, Harford, Kent, Prince George's, Queen Anne's, Talbot, Washington, Wicomico, and Worcester Counties, in the prosecution of any person for unlawfully carrying a concealed weapon.

> Provided, further, that nothing in this section shall prohibit the use of such evidence in Anne Arundel, Wicomico and Prince George's Counties in the prosecution of any person for a violation of the gambling laws as contained in Sections 303-329, inclusive, of Article 27, sub-title 'Gaming', or in any laws amending or supplementing said sub-title."

The Section was further amended by Chapter 419 of the 1953 Laws of Maryland so as to include Cecil and Wicomico Counties among those exempted from its provisions in the prosecution of certain of the gaming laws and so as to make its provisions inapplicable throughout the State in the prosecution of any person for unlawfully carrying a concealed weapon. The Court of Appeals of Maryland in the case presently appealed held that the exemptions contained in the statute serve to reinstate the common law rule of Maryland, which is that the admissibility of evidence in criminal prosecutions is not affected by the manner in which it is obtained. *Meisinger v. State, supra.*

Appellant ostensibly relies upon the equal protection clause of the Fourteenth Amendment. His explicit argument is that the admission of evidence against him which the statute requires excluded in most of the counties of the State denies him the equal protection of the laws guaranteed by the Fourteenth Amendment. He states that the argument made by Appellee in its Motion to Dismiss this appeal, which was that the case really involves a "balancing of the right of persons to be secure in their privacy against the social need that the criminal law be enforced", does not apply here. However, implicit in his entire argument is the contention that the statute denies due process of law because "the subject matter of the statute impinges upon one of the most fundamental immunities of the citizen". He argues that there is no reasonable difference which would justify the discrimination made by the statute. The

Appellee in its Motion to Dismiss the appeal suggested several reasons to justify the challenged classification. One of these was the recent influx of gamblers into Anne Arundel County. The Appellant's answer to this, set forth at page 26 of his brief, reveals that his real complaint is one involving the application of the due process clause. Thus, he says "the challenged statute through a sort of 'negative direction', contains the kind of 'affirmative sanction' to override the constitutional barrier which violates the due process clause of the 14th Amendment". In support of this he cites *Wolf v. Colorado*, 338 U. S. 25, 93 L. Ed. 1782, where the Court, by way of dictum, acknowledged "that were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the 14th Amendment". Appellee finds it necessary, therefore, to discuss the due process question which is thus indirectly raised by Appellant.

That the admission in a criminal prosecution of evidence secured through a search condemned by constitutional provisions similar to the Fourth Amendment to the Constitution of the United States and to Article 23 of the Declaration of Rights to the Constitution of Maryland does not "impinge upon" a citizens' fundamental immunity is illustrated by study of the history of such constitutional provisions. This history reveals that while a number of remedies were made available to victims of illegal entries and searches, one of these was not the exclusion in criminal prosecutions of evidence thereby obtained. Prior to the contrary rule which was announced in *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, under which evidence illegally obtained was held inadmissible in prosecutions in Federal Courts, only one jurisdiction of those in this country and of those composing the United Kingdom and the British Commonwealth of Nations held evidence so

obtained inadmissible. That jurisdiction was the State of Iowa. *State v. Sheridan*, 121 Iowa 164, 96 N. W. 730. The tables in the appendix to the majority opinion in *Wolf v. Colorado*, *supra*, reveal this information. As of the time of the decision in *Wolf v. Colorado*, *supra*, thirty States had rejected the rule announced in the *Weeks'* case and seventeen had adopted it. In *People v. Defore*, 1926, 242 N. Y. 13, 150 N. E. 585, 588-589, Judge Cardozo refused to adopt the rule of the *Weeks* case and said:

> "'We are confirmed in this conclusion when we reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious. * * * We do not know whether the public, represented by its juries, is today more indifferent to its liberties than it was when the immunity was born. If so, the change of sentiment without more does not work a change of remedy. Other sanctions, penal and disciplinary, supplementing the right to damages, have already been enumerated. No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice.'"

The Court of Appeals of Maryland has never held that the admission of evidence illegally secured denies the accused a fundamental right. Thus, in *Meisinger v. State*, *supra*, 155 Md. at page 199 decided after the *Weeks* case and before the enactment of Article 35, Section 5, *supra*, the Court of Appeals said:

> "The reason upon which the rule rests is that, in the trial of criminal cases, the admissibility of evidence is to be determined by its pertinency to the issue under consideration, and in cases like the one before us the court is not concerned with the collateral question of how such evidence may have been procured. The question of the guilt or innocence of the accused cannot be affected by its method of procurement, if the evidence offered is in itself germane and pertinent to the issue to be decided."

See also *Lawrence v. State*, 103 Md. 17, 63 A. 96. As originally enacted by Chapter 194 of the 1929 Laws of Maryland, Article 35, Section 5, *supra*, required the exclusion of evidence obtained by an illegal search and seizure in cases of all misdemeanors. After this enactment, the Court of Appeals held that the rule in cases of felonies remained the same but that in cases of misdemeanors the Act required exclusion of evidence illegally obtained. *Marshall v. State*, 182 Md. 379, 35 A. (2d) 115; *Delnegro v. State*, ... Md. ....., 81 A. (2d) 241, 242. The exclusionary rule in prosecutions for misdemeanors is, therefore, one created by the Legislature and not by the judiciary.

In *Wolf v. Colorado, supra*, the Court indicated that the exclusion of evidence illegally obtained in Federal prosecutions is not an explicit requirement of the Fourth Amendment but rather is a rule of court created to implement that Amendment. It was there said at pages 28-29 of 338 U. S.:

> "In Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, 34 S. Ct. 341, L. R. A. 1915B 834, Ann. Cas. 1915C 1177, supra, this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the

Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then it has been frequently applied and we stoutly adhere to it. But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the right of privacy might give different answers. When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the Weeks decision."

The holding in *Wolf v. Colorado, supra*, was "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure". See also *Stefanelli v. Minard*, 342 U. S. 117, 96 L. Ed. 138; *Adams v. New York*, 192 U. S. 575, 48 L. Ed. 585. However, in the *Wolf* case, the Court warned that "were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment". It is clear from the context, the Court was referring to the due process clause of that Amendment. Appellant urges that the Act here challenged is in effect a "negative direction" to law enforcement officers to conduct illegal searches and seizures in that it abrogates the legislatively created rule of exclusion in cases of prosecutions for violations of certain of the gambling laws in Anne

Arundel County. While the exemption in isolated individual cases may have the effect attributed to it by the Appellant, there is nothing in the statute which affirmatively sanctions as State policy "police incursion into privacy". One might as well argue that judicial admission of illegally procured evidence or mere legislative failure to act so as to forbid the use of such evidence constituted affirmative sanction. The challenged statute is not of the type condemned in the case of *Ex Parte Rhodes*, Ala., 79 So. 462, where the statute as construed by the Court affirmatively authorized illegal searches and seizures by law enforcement officers. The Court, in *Wolf v. Colorado*, *supra*, and other cases cited above, did not find that the rule followed by most of the States which permits the admission of illegally obtained evidence is such an affirmative sanction to police officers to conduct illegal searches and seizures.

As pointed out above, Article 35, Section 5, *supra*, as originally enacted in 1929 and as in force today, distinguishes between misdemeanors and felonies. As to misdemeanors, the exclusionary rule prevails; as to felonies, it does not. We know of no case in which the contention has been made in a Court of Maryland that the statute as originally enacted is an affirmative sanction for police officers to search the homes of felons and, therefore, denies them due process of law. Likewise, it has never been suggested that the provisions of Section 368 of Article 27 of the Maryland Code (1951 Edition), which exempts prosecutions for violations of the narcotic laws from the exclusionary rule of Article 35, Section 5, *supra*, is unconstitutional as an affirmative sanction for enforcement officers to conduct illegal searches and seizures. It is submitted that to adopt Appellant's argument and to hold that the exemptions contained in the challenged statute are violative of the due process clause as a "negative direction" to law enforce-

ment officers to conduct illegal searches and seizures, this Court must overrule the prior cases in which it held that the Fourteenth Amendment does not forbid the admission of evidence obtained so obtained for it is undoubtedly true that to exclude such evidence in all cases and in all courts would tend to discourage unreasonable searches and seizures. Further, to accept Appellant's argument would cast doubt upon the constitutionality of Article 35, Section 5, *supra*, in its entirety and upon the constitutionality of Article 27, Section 388, *supra*.

In *Wolf v. Colorado*, *supra*, the Court suggested that Congress may have the power by appropriate legislation to negate the exclusionary rule which the Court had formulated to implement the Fourth Amendment. In view of the Court's very positive condemnation of a State statute which would "affirmatively sanction police incursion into privacy", the Court obviously meant that Congress possibly has the power to change the exclusionary rule by an enactment which would authorize the admission in criminal prosecutions of evidence illegally obtained and not by an enactment affirmatively sanctioning illegal searches and seizures. It is submitted that the challenged statute does no more than the converse of what this Court suggested Congress may have the power to do viz: it abrogates a legislatively created rule of evidence and thereby reinstates the judicially created rule.

Appellant makes much of the fact that the trial court made the "pernicious assumption" that the challenged statute gave the police "the right" to illegally enter his premises. This statement by the trial court was erroneous and the Appellee has never contended that the statute confers such a right nor does it so contend now. The Court of Appeals suffers from no such misapprehension, as is manifest from its opinion in the present case. See *Salsburg v. State*, *supra*,

94 A. (2d) at page 282. It is the decision of the lower court from which an appeal is taken and not from the reasons given in support of the decision. It has often been held both by this Court and the Court of Appeals of Maryland that where the decision below is correct, it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action. *J. E. Riley Inv. Co. v. Commissioner of Internal Revenue*, 311 U. S. 55, 85 L. Ed. 36; *Securities & Exchange Com. v. Chenery Corp.*, 318 U. S. 80, 87 L. Ed. 626; *Velasco v. Protestant Episcopal Church*, ... Md. ....., 92 A. (2d) 373; *Schriver v. Schriver*, 185 Md. 227, 44 A. (2d) 479.

The statute here involved is directed simply to the admissibility of evidence and does not confer a "right" upon law enforcement officers to invade the privacy of citizens. As was observed in *Wolf v. Colorado, supra*, at page 291 of 338 U. S., although evidence secured by an illegal search and seizure may be held admissible in a State court, the common law provides action for damages against the officer who conducts the search.

II.

THE ACT HERE CHALLENGED IS NOT REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Every legislative act, including those which appear on their face to contravene some specific prohibition of the Constitution, carries with it the presumption of validity and it should not be stricken down unless it is susceptible of no construction which will make it constitutional.

At the outset it is to be observed that it is elementary that every presumption is to be indulged in favor of the validity of a legislative enactment and that the courts will not invalidate a statute until this presumption is overcome beyond a reasonable doubt. In *Screws v. United States*,

325 U. S. 91, 89 L. Ed. 1495, the Court pointed out that an unconstitutional construction is to be avoided if possible:

> "This Court has consistently favored that interpretation of legislation which supports its constitutionality. Aschwander v. Tennessee Valley Authority, 297 U. S. 288, 30 L. Ed. 688; National Labor Relations Board v. Jones & L. Steel Corp., 301 U. S. 1, 81 L. Ed. 893. * * *."

Cases directly in point are those which hold that where a law is attacked as violative of the equal protection clause, there is a presumption in favor of the legislative classification, and if any state of facts can reasonably be conceived to sustain the classification, the existence of that state of facts when the law was enacted must be assumed. Thus, in *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U. S. 580, 584, 79 L. Ed. 1070, 1072, Justice Stone said:

> "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. Rast v. Van Deman & L. Co., 240 U. S. 342, 357, 60 L. Ed. 679, 687, 36 S. Ct. 370, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; State Tax Comrs. v. Jackson, 283 U. S. 527, 537, 75 L. Ed. 1248, 1255, 51 S. Ct. 540, 73 A. L. R. 1464, 75 A. L. R. 1536."

In *Fort Smith L. & T. Co. v. Board of Imp. of Paving Dist.*, 274 U. S. 387, 71 L. Ed. 1112, it was held that a Street

railway company was not deprived of the equal protection of the laws where it was required to pay a State paving assessment which was not imposed upon companies operating in other municipalities. The Court enumerated various conditions which it assumed might exist which would justify the discrimination, and said at page 392 of 274 U. S.:

> "* * * We may not assume in the absence of proof that such differences do not exist. Erb v. Morasch, 177 U. S. 584, 586, 44 L. Ed. 897, 898, 20 Sup. Ct. Rep. 819; Middleton v. Texas Power & Light Co., 249 U. S. 152, 158, 63 L. Ed. 527, 531, 39 Sup. Ct. Rep. 227; Swiss Oil Corp. v. Shanks, 273 U. S. 407, ante, 709, 47 Sup. Ct. Rep. 393.
>
> "There are no facts disclosed by the record which would enable us to say that the legislative action with which we are here concerned was necessarily arbitrary or unreasonable or justify us in overruling the judgment of the state court that it was reasonable. Durham Pub. Serv. Co. v. Durham, supra, 154 [67 L. Ed. 585, 43 Sup. Ct. Rep. 290]."

See also *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 465, 89 L. Ed. 1725, 1737; *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495, 510, 81 L. Ed. 1245, 1253; *Whitney v. California*, 274 U. S. 357, 370, 71 L. Ed. 1095, 1103.

The Court of Appeals of Maryland follows a similar rule and stated the presumption of constitutional validity in the instant case, 94 A. (2d) at page 283. In *Mt. Vernon Co. v. Frankfort Co.*, 111 Md. 561, 75 A. 105, a statute which forbade employment of any person under fourteen years of age in the mills and factories of the State was attacked as denying equal protection of the laws. The discrimination complained of was the exemption of canning factories *and*

certain of the counties. The Court, in sustaining the act, said at page 570:

> "* * * In *Cooley's Constitutional Lim.* (6th Ed.), page 216, it is said: 'The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in doubtful cases.' And again, on page 220, that the Courts 'must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the Legislature when the Act was passed.' In *ex parte Spencer*, 86 Pac. Rep. 896, it was said that: 'The presumption always is that an Act of the Legislature is constitutional, and when this depends on the existence or non-existence of some fact, or state of facts, the determination thereof is primarily for the Legislature, and the Courts will acquiesce in its decision, unless the error clearly appears'."

See also *Brown v. State*, 177 Md. 321, 330-331, 9 A. (2d) 209; *State v. Seney Co.*, 134 Md. 437, 438, 107 A. 189; *State v. Shapiro*, 131 Md. 168, 172, 101 A. 703; *Ruggles v. State*, 120 Md. 553, 561-563, 87 A. 1080.

The Appellant argues that where a statute deals with a fundamental right of a citizen it is not entitled to the presumption of constitutional validity. The cases decided by this Court which the Appellant cites in support of this statement involve an application of one of the first eight amendments to the Constitution of the United States. The present case does not involve an application of the Fourth Amendment inasmuch as this Court has consistently held that the requirements of that Amendment are not incorporated in the Fourteenth. Further, the Appellee submits that the rule does not vary, as stated by Appellant. The true state of the law, as Appellee sees it, is that expressed

by Mr. Justice Stone's footnote in *United States v. Carolene Products Co.*, 304 U. S. 144, 152, 82 L. Ed. 1234:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U. S. 359, 369, 370, 75 L. Ed. 1117, 1122, 1123, 51 S. Ct. 532, 73 A. L. R. 1484; Lovell v. Griffin, No. 391 this term, decided March 28, 1938 [303 U. S. 444, 452, ante, 949, 954, 58 S. Ct. 666]."

See also *Dennis v. United States*, 341 U. S. 494, 501, 95 L. Ed. 1137, 1143 and cases there cited.

B. Diversification of State laws on a territorial basis is not repugnant to the equal protection clause of the Fourteenth Amendment in the absence of manifest and obvious unreasonableness.

As is said by the Court of Appeals of Maryland in the opinion affirming the instant case, it has always been the policy of the State of Maryland to permit the enactment by the State Legislature "of local laws affecting only one county or the exemption of particular counties from the operation of general laws or some provisions thereof" 94 A. (2d) at page 285.

Cases in which the Court of Appeals has upheld such local laws and in which the question of equal protection was an issue are legion. Many of these contain the type of double classification present in the challenged statute. Some examples are *Chappel Chem. & Fertilizer Co. v. Sulphur Mines Co. of Virginia*, 85 Md. 684, 36 A. 712 (a rule peculiar to Baltimore City requiring all civil cases to be tried without a jury unless a jury trial is specifically requested); *Stevens v. State*, 89 Md. 669, 674, 43 A. 929 (statute made the possession of certain game at certain times a crime and

excepted some counties from its operation)[1]; *Mt. Vernon Co. v. Frankfort*, supra (statute forbidding the employment of persons under fourteen years of age in the mills and factories of the State, exempting canning factories as well as certain of the counties); *Sweeten v. State*, 122 Md. 634, 90 A. 180 (statute providing an eight hour day for laborers upon public works and applying to Baltimore City only)[2]; *American Coal Co. v. Allegany County*, 128 Md.

---

[1] 89 Md., at page 674:

"It cannot be successfully contended that the law now under consideration is unconstitutional, because it operates unequally upon the inhabitants of the several parts of the State, and that it discriminates against the residents of Baltimore City, by reason of the fact that a number of counties are excepted from its operation. It has long been the policy of the State of Maryland to enact local laws affecting only certain counties, or to exempt particular counties or localities from the operation of general laws or of some of the provisions thereof."

[2] 122 Md., at pages 640-641:

"* * * We must bear in mind that we are dealing with a municipal corporation and as is said in *Cooley's Const. Limitations* (7th Ed.), page 555: 'The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The Legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid.' * * * The fact that other agencies are not so restricted provokes no unlawful discrimination, so long as the statute prescribes a rule of conduct which applies alike to all who contract to do work for the particular municipality and alike to all who are employed to labor on such work. The case of *Penn Bridge Co. v. U. S.*, 29 App. Cases (Dist. Columbia), 452, is an illustration of this principle. Congress passed an eight-hour labor law, somewhat similar to the Maryland statute, applicable only to government work in the District. The fact that its application was thus limited did not invalidate it."

564, 98 A. 143 (statute applying to two counties only, which provided a relief fund for coal miners only)[3]; *State v. Shapiro*, *supra* (statute regulating junk dealers, requiring a different license fee according to size of city); *Brown v. State*, *supra* (statute imposing license tax on hawkers and peddlers, exempting peddlers of oysters, fish, fruits and vegetables).[4] See also *Ruggles v. State*, *supra*; *Grossfeld v. Baughman*, 148 Md. 230, 235, 129 A. 370; *Robey v. Broerman*, 181 Md. 325, 331, 29 A. (2d) 837. Compare *Neuenschwender v. Washington Suburban Sanitary Commission*, 187 Md. 67, 48 A. (2d) 392, where the Court of Appeals sustained the constitutionality of a statute which applied to only three of the counties and which provided that no suit for damages shall be maintained against a municipal corporation unless written notice of the claim shall be presented within ninety days after the injury or damage. The fact that no question of denial of the equal protection of the laws was raised in that case illustrates

---

[3] 128 Md., at page 560:

"* * * 'The restriction of the law to Allegany and Garrett Counties can prove no stumbling block for such local limitations are recognized as legal and proper, if all within the selected locality are treated alike and the locality itself is broad enough to work no harmful discrimination. * * * The classification, therefore, is in fact all-inclusive; it rests upon a natural, reasonable and essential basis of difference between this and other industries, and is therefore sound'."

[4] 177 Md., at pages 330-332:

"* * * the court could not on anything now before it find unconstitutional discrimination against those not exempted. * * *

"An objector on this ground has the burden of demonstrating the existence of the unconstitutionality. 'Every presumption is to be made in support of the theory that the General Assembly has validly and properly exercised its powers.' * * *

"* * * The mere existence of exemptions does not therefore establish unconstitutional discrimination. There must be more. And no more is made to appear to the court. The objection has not, therefore, been sustained."

the extent to which such local legislation is accepted in Maryland as a part of its system of law.

The enactments of the General Assembly of Maryland fall into two accepted classifications; viz., public local laws and public general laws. Public general laws are codified in the Annotated Code of Maryland (1951 Edition). The public local laws are codified in the Code of Public Local Laws of Maryland (1930 Edition); the various counties also publish codifications of the local laws which apply to them. A most superficial perusal of these codifications discloses the extent to which Maryland follows a policy whereby local needs and desires are satisfied in the State Legislature by the passage of local laws and by the exemption of certain counties from State-wide laws. Only Baltimore City and Montgomery County have elected to accept charter form of local self-government, as provided in Article 11A of the Maryland Constitution. While the Maryland Code purports to be a compilation of public general laws, it, in fact, contains many statutory exemptions which have the effect of making many of the provisions of that Code local in nature. Some of the laws which appear in the Public General Laws as compiled in the 1951 Code and which apply differently in different counties are as follows:

(1) Article 2B regulates the sale of alcoholic beverages and the requirements as to when sales are permissible, types of licenses, license fees, etc., vary from county to county and sometimes from city to city in a manner which illustrates the accommodation of local desires and needs by the legislature.

(2) Article 27, Sections 578 through 610B, the law relating to Sabbath breaking varies from county to county and often applies differently in towns and municipalities within the same county.

(3) Article 27, Section 566, which is a criminal statute applying to junk yards, exempts five counties from its provision.

(4) Article 27, Section 545, a criminal statute relating to the placing of dangerous material upon the highways, exempts two counties.

(5) Article 27, Section 146, which makes it a crime to enter the property of another and to act in a disorderly manner, applies to six of the twenty three counties only.

(6) Article 27, Section 136, the criminal statute prohibiting interference with systems of water supply, exempts one county from its provision.

(7) Article 27, Section 672, setting up a special procedure for proceeding by information in criminal cases, does not apply in Baltimore City and Baltimore County.

(8) Article 51, Section 7, grants the right of jury service to women but exempts ten counties so that women may not serve on juries there.

(9) Article 51, Section 9, provides a different method of selecting jury panels for the various counties.

Many other instances could be mentioned. The index to the 1953 laws of Maryland reveals that during the greater portion of the session the General Assembly was concerned with local legislation. The compilation of those laws which are classed as public local laws in the Code of Public Local Laws of Maryland (1930 Edition) is impressive testimony

to the extent to which the General Assembly of Maryland enacts laws which are diversified territorially. This compilation consists of a two volume set, which runs to 5,334 pages. Many more local laws have been enacted since 1930 at each session of the General Assembly. Space does not allow a detailed discussion of the manner in which local legislation affects the various counties. Suffice it to say that these local laws run the gamut of those things within the province of the Legislature, from providing public health, safety and welfare to the providing of procedure in the local courts.

The history of the challenged statute is illustrative of the manner in which the public general laws are made to conform with local desires and needs. As enacted by Chapter 194 of the 1929 Laws of Maryland, the statute required that in the trial of all misdemeanors throughout the State evidence procured by illegal search and seizure shall be deemed inadmissible. The Act was amended by Chapter 752 of the 1947 Laws of Maryland to exempt from its provision prosecutions for unlawfully carrying a concealed weapon in Baltimore County. Baltimore City and thirteen counties joined Baltimore County in this exemption by the enactment of Chapter 145 of the 1951 Laws of Maryland. Chapter 704 of the 1951 Laws of Maryland exempted from the provisions of the statute prosecutions for violation of certain of the gambling laws in Anne Arundel County. Wicomico and Prince George's Counties joined Anne Arundel County in this exemption by the enactment of Chapter 710 of the Acts of 1951. Chapter 59 of the 1952 Laws of Maryland enacted Section 5A of Article 35 of the Maryland Code (1951 Edition), the effect of which was to exempt from the provision of the challenged statute prosecutions for unlawfully carrying a concealed weapon throughout the

State. With the enactment of Chapter 84 of the 1953 Laws of Maryland, Worcester County joined Anne Arundel, Wicomico and Prince George's Counties in the exemption relative to the gambling laws. The history of this Act follows a familiar pattern, and this pattern has an accepted place in the legislative process of the State of Maryland.

Appellant's contention that the challenged statute deprives him of the equal protection of the laws guaranteed by the Fourteenth Amendment does not find support in the decisions of this Court or the Court of Appeals of Maryland. The Court of Appeals decisions have been discussed earlier in this brief. The challenged statute deals with the admissibility of evidence. The decisions of this Court, discussed hereinafter, reveal that the equal protection clause allows the State a wide latitude in diversifying laws which relate to the administration of justice and which provide systems of procedure in the State courts. The Appellant has not cited, and the Appellee has been unable to find, a single case in which this Court has condemned a statute which dealt with those subject matters and which made territorial classifications. On the other hand, there is a long line of cases upholding statutes which diversify laws territorially. The Appellant cites these cases, but attempts to distinguish them, arguing that the reasonableness of the classification was assumed by this Court without discussion because it was so apparent or was expressly found in the unequal distribution of population. It is Appellee's contention that the lack of any mention of a rational basis for the classification in these cases illustrates an application of the presumption that the Legislature was acting upon facts known to it which would justify the discrimination. The cases applying this presumption to other types of classification have been discussed earlier in this brief.

In *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989, the Court found that equal protection was not denied by provisions of the Constitution and Laws of Missouri which allowed an appeal to the Supreme Court of the State from any final judgment of any Circuit Court and where certain counties were excepted from these provisions and a separate appeal court was provided for them. The Court did not find a reasonable ground of difference, but apparently assumed that it existed. The Court said:

> "If, however, we take into view the general objects and purposes of the 14th Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges or immunities, and from depriving any person of life, liberty or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. * * *
>
> "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either

portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

"The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. * * *"

In *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578, the Court refused to find a denial of the equal protection of the laws where the statute in question provided that in capital cases in cities having a population of one hundred thousand inhabitants the State shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the State eight peremptory challenges where allowed in such cases. The Court expressly found a rational basis for the classification in the population difference.

In *Chappel Chem. & Fertilizer Co. v. Sulphur Mines Co. of Virginia, supra*, the Court upheld the rule, peculiar to Baltimore City, requiring all civil cases to be tried without a jury unless one was specifically requested. The question of a rational basis for the classification was not discussed. In *Mallett v. North Carolina*, 181 U. S. 589, 598-599, 45 L. Ed.

1015, 1020, the Court held that a statute which allowed the State an appeal from the granting of a new trial to an accused in criminal cases was not a denial of the equal protection where this right of appeal was given in one district of the State and not in another. The Court simply quoted from *Missouri v. Lewis, supra*, and did not discuss the necessity for a rational basis for the classification, much less attempt to find one.

In *Ocampo v. United States*, 234 U. S. 91, 58 L. Ed. 231, the Court did not find that the equal protection requirement was infringed by a law which denied to the inhabitants of Manila the right to a preliminary examination in criminal cases, which right was accorded to all other persons in the Philippine Islands. The Court did not attempt to find a rational basis for the discrimination although it was probably present in population differences, and said, through Justice Pitney, at page 98 of 234 U. S.:

> "That the requirement of an indictment by grand jury is not included within the guaranty of 'due process of law' is, of course, well settled. * * *
>
> "It is contended that since act No. 612 denies to the inhabitants of Manila the right to a preliminary examination which is accorded to all other people in the Islands, it denies the equal protection of the laws guaranteed by the act of Congress. But it was long ago decided that this guaranty does not require territorial uniformity. * * *"

See also *Gardner v. Michigan*, 199 U. S. 325, 333-334, 50 L. Ed. 212, 217 (no discussion of the reasonableness of the classification and citing *Missouri v. Lewis, supra*); *Morris v. Alabama*, 302 U. S. 642, 82 L. Ed. 499 (a per curiam dismissal of an appeal, citing *Missouri v. Lewis, supra*, and *Hayes v. Missouri, supra*); *Jannett v. Hardie*, 290 U. S. 602-603, 78 L. Ed. 529 (a per curiam dismissal of an appeal,

citing *Missouri v. Lewis, supra*, and *Hayes v. Missouri, supra.*)

There are a number of cases which hold that a State may vary, from one locality to another, the punishment for the same criminal act and may make an act a criminal offense when committed in one locality which would not be so if done in another. This Court, even before the adoption of the Twentieth Amendment to the Constitution of the United States, consistently held that the States under the police power have absolute authority over the sale and manufacture of alcoholic beverages within their borders and might, by local option law, prohibit the same in certain localities while allowing it in others. *Ohio, ex rel. Lloyd v. Dollison*, 194 U. S. 445, 48 L. Ed. 1062; *Rippey v. Texas*, 193 U. S. 504, 48 L. Ed. 767; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205. Appellant, in a footnote at page 31 of his brief, distinguishes these cases on the basis that they are in a different category. However, if this distinction is valid, categories are tyrannical indeed. A State also has absolute control over gambling and should as well be allowed to prohibit it conditionally.

If "the odds 'on the bobtailed nag' are the same whether the bet is made in Annapolis * * * or Cumberland", it is equally true that the effects of a given quantity of "moonshine" remains constant regardless where consumed.

In *People, ex rel. Armstrong v. Warden of the City Prison of New York, N. Y.*, 76 N. E. 11, the traverser was convicted under a law which regulated employment agencies in cities of two classes only. He sought release on habeas corpus, contending that the statute denied equal protection to residents of cities falling within the two classes. The Court refused to so hold and said:

"* * * it seems to be well settled in this court and in the federal court that the equality within the contemplation of the 14th amendment does not necessarily include a territorial equality, and that legislation which, though limited in the sphere of its operation, affects alike all persons similarly situated within such sphere is valid. * * * Criminal laws are not necessarily unconstitutional, even if they bear unequally upon persons in different parts of the state. The evil which the legislature may have in view in passing such laws may exist only in the great cities of the state, and have no existence in rural districts."

See also *People v. Havnor*, N. Y. 43 N. E. 541; *Surratt v. Commonwealth*, 187 Va. 940, 48 S. E. (2d) 362; *Broadfoot v. City of Fayetteville*, N. C., 28 S. E. 515.

In *Armstrong v. State*, 248 Ala. 124, 26 So. (2d) 874, it was held that a statute authorizing condemnation of an automobile transporting intoxicating beverages did not violate the equal protection clause by reason that such illegal transportation in a dry county subjected the automobile to confiscation while in a wet county it was subject to condemnation only if the liquor was being transported for unlawful sale or without the required stamps.

In *People v. Hanrahan*, Mich., 42 N. W. 1124, a State law and city ordinance, which provided different penalties for the keeping of a house of ill fame, were held not to deny the equal protection of the laws, and the Court said at page 1126 of 42 N. W.:

"* * * The Legislature has power to declare that certain acts committed in a particular locality shall constitute a criminal offense and shall be punished as a felony; while the same act, if done in another locality

or section of the state, would not be a criminal offense at all."

For other cases allowing the imposition of different punishment in different parts of the State for the same offense, see *People, ex rel Ward v. McCann*, 117 Misc. Rep. 798, 193 N. Y. S. 387; *People, ex rel. Kipnis v. McCann*, 199 App. Div. 30, 191 N. Y. S. 574, affirmed 138 N. E. 422.

Appellant complains of the "classification within a classification" made by the challenged statute. A double classification does not of itself invalidate a law. In *People v. Pennock*, Mich., 293 N. W. 759, an ordinance of the City of Detroit which regulated the sale of contraceptive articles by permitting only druggists operating a bona fide drugstore with a prescription department to conduct such sales was attacked by pharmacists who desired to sell the articles in stores other than those described. The Court found a rational basis for the "classification within a classification" and refused to strike down the ordinance. A number of the cases previously cited contains such double classification. See also *Rosenthal v. New York*, 226 U. S. 260, 57 L. Ed. 212.

C. There is a rational basis for the territorial and subject matter classifications made in the challenged statute.

The challenged statute contains a territorial classification in that the exemption applies to Anne Arundel County only and a subject matter classification in that the exemption applies to prosecutions for violations of only certain of the gambling laws; viz., bookmaking, the keeping of a gambling table, the keeping of a house, etc., for gambling

Article 27, Sections 303-329 of the Maryland Code (1951 Edition). The Appellant first complains that no rational basis may be conceived for the territorial classification. The Appellee suggests that a rational basis is found in the recent increase in gambling activity in the exempted county. Anne Arundel County is immediately adjacent to Baltimore City. In order to discourage gambling violations, the Criminal Court of Baltimore has in the past several years adopted a policy of imposing more prison sentences and of increasing the length of the sentences imposed upon those convicted of gambling activity. This is accomplished by imposing the maximum prison sentence for the substantive offense and by the more extensive use of indictments charging conspiracy. Conspiracy carries a maximum sentence of ten years (Article 27, Section 46 of the Maryland Code, 1951 Edition), while the usual maximum penalty for the substantive violation is one year (See Article 27, Sections 306, 311, 312, 425 and 427). Recent appeals from the Criminal Court of Baltimore to the Court of Appeals in which those convicted of gambling violations complained that their sentences were excessive illustrate this trend. See, for example, *Hurwitz v. State*, ... Md. ...., 92 A. (2d) 575, 581.

The prospect of heavier prison sentences has undoubtedly caused many gamblers to remove their operations from Baltimore City to adjacent Anne Arundel County. The greater part of that County is rural in nature and the bucolic setting affords many retreats ideally suited for the clandestine operation of gambling enterprises which are difficult of detection. The County is especially inviting to gamblers who reside in Baltimore because of its proximity to that City. The Hon. William L. Henderson, Associate Judge of the Court of Appeals of Maryland, suggested, at

the time of the original argument of the instant case, that the Legislature might well have taken cognizance of the recent influx of gamblers into Anne Arundel County and that this furnished one rational basis for the classification. Appellant, at page 25 of his brief, states that there is no proof in the record of an influx of gamblers into Anne Arundel County. It it submitted that such proof is unnecessary. The Courts in applying the presumption of constitutional validity hold that "the burden of establishing the unconstitutionality of a statute rests on him who assails it", that where certain differences are called to the attention of the Court in support of a classification the Court "may not assume in the absence of proof that such differences do not exist", and that a statutory discrimination will not be set aside "if any state of facts reasonably may be conceived to justify it". *Fort Smith L. & T. Co. v. Board of Imp. Paving Dist., supra; Metropolitan Casualty Ins. Co. v. Brownell, supra.* The Appellee submits most earnestly that the matters above set forth furnish a rational basis for the classification, both as to territory and as to the evil which is sought to be corrected.

The subject matter exemption made by the challenged statute does not apply to prosecutions for violations of the State-wide lottery law. See Article 27, Sections 423-438 of the Maryland Code (1951 Edition). Nor does the exemption apply to prosecutions for violations of local laws applicable to Anne Arundel County which prohibit the making of book on the result of any horse race in the County and which prohibit "crap" games there. See Sections 338 and 339, Code of Public Local Laws of Anne Arundel County (1947 Edition). Appellant complains that the effect of this is to create "second and third classifications", which have no rational basis. It is to be noted that while Appellant complained of the classification as to the crime

of gambling before the Court of Appeals of Maryland, he raised no contention relative to the classification or discrimination made between bookmaking and lottery. This contention is made for the first time in Appellant's brief and was not made at the time he filed his brief entitled "Statement as to Jurisdiction". His complaint relative to the two Sections of the local law is without merit inasmuch as these Sections are practically identical to several of the Sections of the State-wide law to which the exemption of the challenged statute applies. Thus, Section 315 of Article 27 proscribes the playing of the game of "craps" and Section 306 of Article 27 forbids the making of book on the horse races. Indictments in Anne Arundel County are drawn around the State-wide law, as witness the instant case.

There is a difference in the manner in which a lottery enterprise, as distinguished from a bookmaking enterprise, is conducted which would furnish a rational basis for the subject matter classification here involved. A lottery enterprise necessarily involves a great deal of open and overt activity which is not present in bookmaking. Contact must be had with the wagerer so that the lottery slip may be sold. The buyer of the lottery number retains a slip as does the seller. Hence, there is a claim of command, including "runners", "pick-up" men and "writers". Law enforcement officers become familiar with the pattern of operation of a lottery and, have less difficulty in establishing the probable cause necessary for the issuance of a warrant than they do in cases of bookmaking, where the only activity is the telephone call to the bookmaker's den. See *Bratburd v. State*, 193 Md. 352, 356-357, 68 A. (2d) 446, where the Court of Appeals described the overt indicia of a lottery operation. That open and overt activity is often a necessary part of a lottery operation is indicated by three

cases awaiting this Court's consideration during the present term and in which the Court is asked to decide whether radio and television give-away programs are lotteries. *F.C.C. v. American Broadcasting Co., Inc.; F.C.C. v. National Broadcasting Co., Inc.; F.C.C. v. Columbia Broadcasting System, Inc.*, Nos. 117-119, October Term, 1953.

The gambling cases decided by the Court of Appeals of Maryland in the 1951 and 1952 Terms of that Court illustrate that the operation of a lottery involves more open activity than does the making of book and that those engaged in lottery are, therefore, easier to apprehend than those engaged in the latter enterprise. Of the cases involving gambling during these two Terms of Court, some twenty-nine were appeals from convictions of violations of the lottery laws, while approximately six were appeals from bookmaking convictions. These cases reveal that the open activity involved in lottery violations follows such a pattern that arrests and searches are often sustained without the necessity of a warrant and that, where a warrant is required, it is not too difficult to show probable cause for its issuance. This usual pattern of activity is that of a "pick-up man" receiving lottery slips from a "runner" and the "pick-up man" reporting to headquarters with the lottery slips contained in what is usually described as a "brown paper bag". Often the activity involves the actual sale and exchange of the slips before the eyes of police officers who are lurking near by. On the other hand, the bookmaker's practice is to remain in his room behind closed doors and to receive his business over the telephone.

The comments made in the last paragraph are borne out by the cases decided in the 1951 and 1952 Terms of the Court of Appeals of Maryland. During those two Terms, the Court held that lottery activity observed by the police afforded probable cause for the issuance of a warrant in

the following cases. *Fleming v. State*, ... Md. ..., 92 A. (2d) 747; *Martini v. State*, ... Md. ..., 92 A. (2d) 456; *Hayette v. State*, ... Md. ..., 85 A. (2d) 790; *Lee v. State*, ... Md. ..., 84 A. (2d) 63; *Bland v. State*, ... Md. ..., 80 A. (2d) 43. It was held in six cases decided during those two terms of Court that the lottery violations were committed in the presence of the police so that a warrant was not required. *Bradley v. State*, ... Md. ..., 96 A. (2d) 491; *Yanch v. State*, ... Md. ..., 93 A. (2d) 749; *Eisenstein v. State*, ... Md. ..., 92 A. (2d) 739; *Griffin v. State*, ... Md. ..., 92 A. (2d) 743; *Robinson v. State*, ... Md. ..., 88 A. (2d) 310; *Shelton v. State*, ... Md. ..., 84 A. (2d) 76. Other appeals from lottery convictions during those two terms of Court in which the question of an illegal search was not raised and in which the legality of the arrest or the probable cause for the issuance of the search warrant was patent are: *Noel v. State*, ... Md. ..., 96 A. (2d) 7; *Berry v. State*, ... Md. ..., 95 A. (2d) 319; *King v. State*, ... Md. ..., 93 A. (2d) 553; *Bell v. State*, ... Md. ..., 86 A. (2d) 567; *Brown v. State*, ... Md. ..., 88 A. (2d) 469; *Moore v. State*, ... Md. ..., 87 A. (2d) 577; *Saunders v. State*, ... Md. ..., 87 A. (2d) 618.[*] Appeals from convictions of bookmaking during the same period number approximately six only. *Carpenter v. State*, ... Md. ..., 88 A. (2d) 180; *Saum v. State*, ... Md. ..., 88 A. (2d) 562; *Curreri v. State*, ... Md. ..., 85 A. (2d) 454; *Kershaw v. State*, ... Md. ..., 85 A. (2d) 783; *Goss v. State*, ... Md. ..., 84 A. (2d) 57; *Meade v. State*, ... Md. ..., 84 A. (2d) 582.

---

[*] Other appeals from convictions of substantive violation of the lottery laws during the 1951 and 1952 Terms are: *Lingner v. State*, ... Md. ...., 86 A. (2d) 888; *Cross v. State*, ... Md. ...., 86 A. (2d) 891; *Delnegro v. State*, ... Md. ...., 81 A. (2d) 241. Appeals from convictions of conspiracy to violate the lottery laws during those terms are: *Comi v. State*, ... Md. ...., 97 A. (2d) 129; *Adams v. State*, ... Md. ...., 97 A. (2d) 281; *Rouse v. State*, ... Md. ...., 97 A. (2d) 285; *Scarlett v. State*, ... Md. ...., 93 A. (2d) 753; *Hurwitz v. State*, ... Md. ...., 92 A. (2d) 575; *McGuire v. State*, ... Md. ...., 92 A. (2d) 582.

The Appellee submits most earnestly that the comparatively small number of bookmaking convictions during the 1951 and 1952 Terms of the Court of Appeals of Maryland illustrates that this type of gambling enterprise is conducted more furtively, is, therefore, more difficult of detection and that this difference between it and the operation of a lottery furnishes a rational basis for the subject matter discrimination made in the challenged statute.

If the subject matter classification under discussion abridges the right of the equal protection of the laws, then likewise the classification as to misdemeanor and felony which the challenged statute has contained since its enactment in 1929 must also abridge that right. The primary discrimination contained in Section 5, Article 35, *supra*, is that it serves to exclude evidence illegally secured in prosecutions for misdemeanors anywhere in the State, while in prosecutions for felonies such evidence remains admissible. The distinction between felonies and misdemeanors follows no rational pattern in the State of Maryland. Only those crimes are felonies which were such at common law or have been so declared by statute. *Bouser v. State*, 136 Md. 342, 110 A. 854. It is thus left to the Legislature to determine whether a given crime shall be a felony or a misdemeanor. Because of this, the distinction between a felony and a misdemeanor often has become meaningless when considered in terms of the harmful tendency of the conduct condemned or in terms of the degree of punishment imposed. Many examples of this appear in Article 27 of the Maryland Code (1951 Edition). For example, larceny to the value of $25.00 and upwards is declared a felony punishable by a sentence of not more than fifteen years (Section 405 of Article 27), and larceny of any pipe attached to any store, warehouse, etc., is declared a felony

punishable by imprisonment of not less than one year nor more than eight (Section 417 of Article 27). On the other hand, a person convicted of a third offense against the narcotic laws receives a mandatory sentence of not less than ten years and such a violation is a misdemeanor (Section 389 of Article 27). Prior to the enactment of Chapter 402 of the 1943 Laws of Maryland, assault with intent to rape assault with intent to murder, and assault with intent to rob were misdemeanors. Assault with intent to rape, although a misdemeanor, carried a possible death penalty (Section 12, Article 27, Maryland Code (1939 Edition)). At the same time, larceny to the value of $25.00 and upwards was deemed a felony, punishable by a sentence of not more than fifteen years. See Section 367 of Article 27, Maryland Code (1939 Edition). Many more instances might be cited.

It is thus apparent that there is more of a rational basis for the discrimination between lottery and bookmaking than there is for the statute's basic discrimination between felonies and misdemeanors.

CONCLUSION

Upon the facts and the foregoing authorities, it is respectfully contended, that the assailed law does not deny the Appellant any rights guaranteed to him by the Constitution of the United States, and that the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

EDWARD D. E. ROLLINS,
Attorney General,

J. EDGAR HARVEY,
Deputy Attorney General,

AMBROSE T. HARTMAN,
Assistant Attorney General,
For Appellee.